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# TRANSCRIPT OF RECORD.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1899.

No. 201.

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H. C. OSBORNE, WILLIAM KNAPP, A. BARBER, ET AL.  
APPELLANTS.

*vs.*

THE SAN DIEGO LAND AND TOWN COMPANY OF  
MAINE.

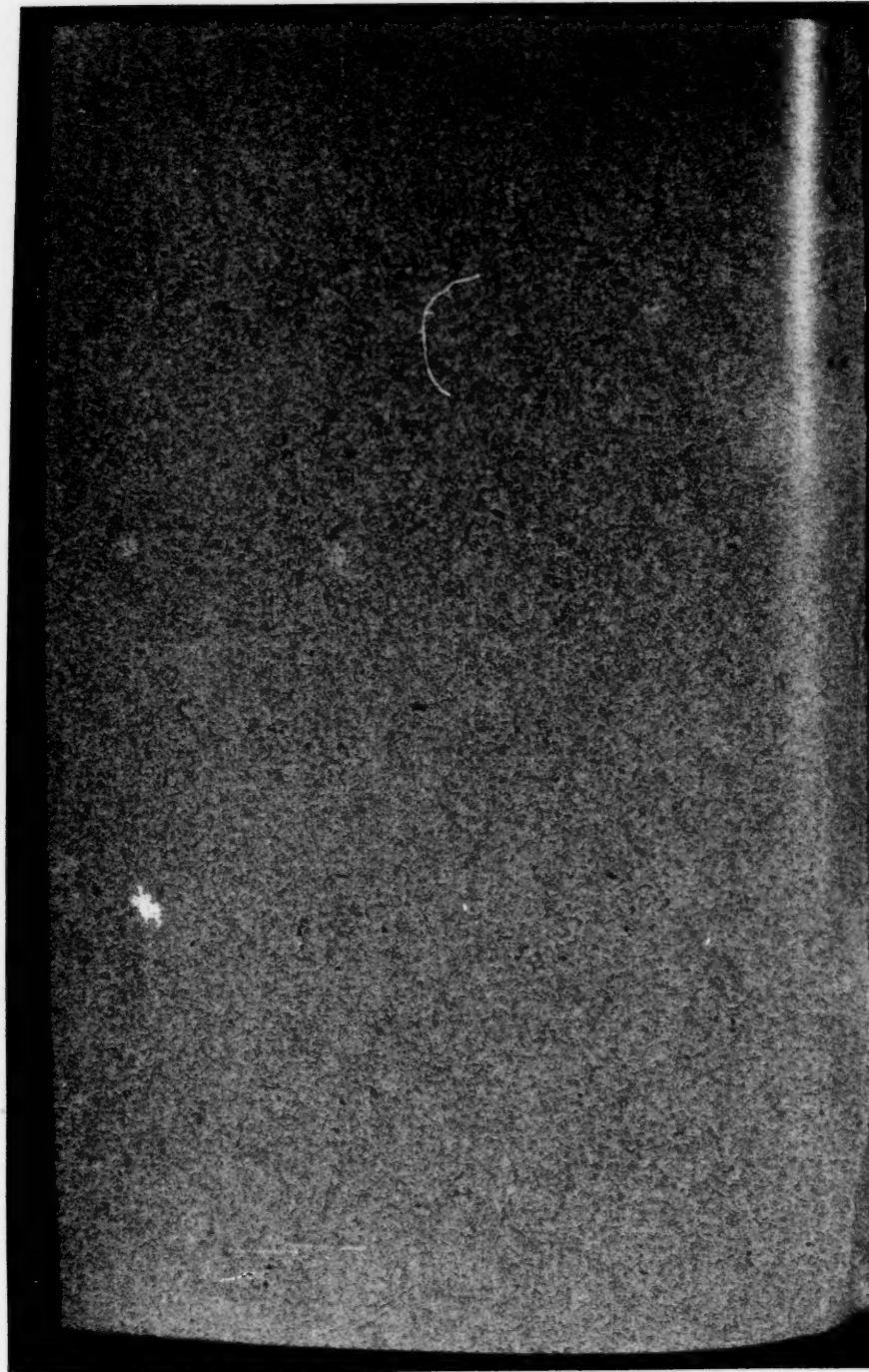
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APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR  
THE SOUTHERN DISTRICT OF CALIFORNIA.

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FILED JANUARY 30, 1899.

(17,286.)





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*vs.*

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## a UNITED STATES OF AMERICA, ss :

To San Diego Land & Town Company of Maine, Greeting :

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be held at the city of Washington, in the District of Columbia, on the 1st day of February, A. D. 1899, pursuant to an order allowing an appeal entered in the clerk's office of the circuit court of the United States of America of the ninth judicial circuit in and for the southern district of California from a final decree made and entered on the 5th day of December, 1898, in that certain cause being in equity, No. 839, wherein H. C. Osborne, William Knapp, A. Barber, Mrs. E. L. Williams, T. M. Eaton, J. M. Davidson, A. J. Smith, A. Hammond, John T. Judkins, Henry Gulick, Sr., H. S. Whittaker, A. Barnett, J. N. Woodward, A. B. Stephens, John Nickson, J. H. Fawcett, Payne Brown, W. E. Montgomery, Monroe Johnson, A. Haines, M. L. Ward, Ella B. Ward, A. Keene, Fred Keene, E. K. Earle, H. F. Earle, Thomas Walker, A. G. White, W. J. Brower, P. B. Smith, F. B. Merrian, H. Hyatt, H. Stegeman, R. S. Harris, A. A. Gooden, G. A. Dukes, C. H. Rippey, Virginia Rippey, C. C. Jobes, J. L. Griffin, Tallie Spencer Sullivan, W. C. Kimball, J. C. Frisbie, S. W. Morgan, George Hannalis, F. B. Webb, John Haberfellner, W. S. Wilkins, S. W. Haines, Chula Vista School District, S. Healey, M. E. Phinney, D. L. Murdock, Dan. P. Stetzelberger, R. P. Middlebrook, Anson Titus, W. A. Henry, J. W. Preston, W. E. Ballinger, J. H. Blakeslee, Herman Banke, J. C. Alles, D. K. Adams, A. J. Morley, C. F. Wiggins, S. F. Dickinson, O. C. Noyes, J. E. Clouse, Peter Morse, E. W. Dyer, Parsons Shaw, A. C. Crockett, E. E. Flanders, Elisha M. Gavin, Stephen Sheffield, C. A. Whittemore, F. Gardner, Charles Monnike, Carl Reinisch, David K. Horton, George Henninger, J. M. Cook, O. H. P. Forker, I. N. Lamson, George D. Hayes, A. A. Groat, R. H. Longshare, J. G. Shaw, Julian Field, C. E. Foss, Otto Sollner, A. B. Story, L. E. Allen, C. F. Chadwick, A. R. Schulenburg, James W. Jackson, John H. Ferry, Frank W. Hedges, A. V. Bills, C. L. Barber, A. J. Stokes, T. E. Walker, A. J. Grainger, E. P. Hammack, Wah Hong, Edward Gulick and William Gulick and Henry Gulick, partners, doing business under the firm name of Gulick Brothers; John J. Jones, Wm. D. Webber, W. F. Stearns, W. J. Henderson, P. W. Morse, O. Darling, S. J. Bradt, R. W. Vaughan, E. J. Elliott, M. E. Jennings Verity, J. E. Stephens, R. G. Wallace, George H. Hancock, Frank Howe, I. N. Morse, Emil O. Hoeh, C. S. Johnson, J. H. Clough, George L. Henderson, M. Cox, John Johnson, A. T. Burr, A. M. Jameson, H. E. Klammer, J. H. Dean, P. S. Leisenring, J. M. Johnson, Ah Quinn, Ah Lit, J. M. Ballou, S. H. Dale, George M. Tutton, E. P. Lounsbury, George W. De Tar, S. D. Foss, Austin Carey, George J. Jecock, D. S. McBean, Quincy A. Petts, Morton Penfield, J. A. Thomas, J. O. Reinhart, William Doyie, F. O. Reinhart, H. I. Atwater, E. H. Woods, N. H. Downs, Edwin S. Belcher, W. G. Terril, T. G. Ellis, W. M. Carr, D. F. Garrettson and Elisabeth A. Garrettson, executors of the estate of G. A. Garrett-



son, deceased; George M. Darnell, Flora B. Arndt, J. W. Stearns, P. W. Beck, M. G. Miller, J. F. Morrill, Fred W. Pearson, Sunnyside School District, N. J. Pillsbury, Julia Latta, Mary R. Klamer, Thomas Lindsay, E. P. Carr, I. M. Howe and H. B. Howe, partners, doing business under the firm name of Howe Brothers; Arthur Ryan and Michael Mack, partners, doing business under the firm name of Ryan and Mack; James H. Forbes, J. A. Pinkerton, S. D. Murdock, W. Weitekamp, John L. Davis, George H. Eaton, George Rippe, J. H. Greife, F. W. Reid, R. S. Harris, Sweetwater School District, L. W. Goff, George Dashbaugh, Henry Walker, C. C. Hughes, Frank A. Kimball, Henry Haberfellner, F. Mederle, L. C. Wright, Cyrus Johnson, A. W. Howard, Laura F. Meyer, George F. McMurry, F. H. Downes, N. W. Downes are complainants and appellants and you are defendant and appellee, to show cause, if any there be, why the said decree rendered against said appellants, as in the said order allowing the appeal mentioned, should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Erskine M. Ross, United States circuit judge for the ninth circuit, this 20th day of January, A. D. 1899, and of the Independence of the United States the one hundred and twenty-third.

Jan'y 20, 1899.

ERSKINE M. ROSS,

*United States Circuit Judge for the Ninth Circuit.*

d [Endorsed:] In the Supreme Court of the United States. H. C. Osborne *et al.*, appellants, *vs.* San Diego Land & Town Company of Maine, appellee. Citation. Service of the within citation is hereby acknowledged this 20th day of January, 1899. Works & Works, solicitors for complainant and appellee. Filed Jan. 20, 1899. Wm. M. Van Dyke, clerk. — — —, deputy.

1 In the Circuit Court of the United States of America of the Ninth Judicial Circuit in and for the Southern District of California.

No. 839.

H. C. OSBORNE, WILLIAM KNAPP, A. BARBER, MRS. E. L. WILLIAMS, T. M. Eaton, J. M. Davidson, A. J. Smith, A. Hammond, John T. Judkins, Henry Gulick, Sr.; H. S. Whittaker, A. Barnett, J. N. Woodward, A. B. Stephens, John Nickson, J. H. Fawcett, Payne Brown, W. E. Montgomery, Monroe Johnson, A. Haines, M. L. Ward, Ella B. Ward, A. Keene, Fred Keene, E. K. Earle, H. F. Earle, Thomas Walker, A. G. White, W. J. Brower, P. B. Smith, F. B. Merriam, H. Hyatt, H. Stegeman, R. S. Harris, A. A. Gooden, G. A. Dukes, C. H. Rippey, Virginia Rippey, C. C. Jobes, J. L. Griffin, Tallie Spencer Sullivan, W. C. Kimball, J. C. Frisbie, S. W. Morgan, George Hannahs, F. B. Webb, John Haberfellner, W. S. Wilkins, S. W. Haines, Chula Vista School District, S. Healey, M. E. Phinney, D. L. Murdock, Dan. P. Stetzelberger.

R. P. Middlebrook, Anson Titus, W. A. Henry, J. W. Preston, W. E. Ballinger, J. H. Blakeslee, Herman Banke, J. C. Alles, D. K. Adams, A. J. Morley, C. F. Wiggins, S. F. Dickinson, O. C. Noyes, J. E. Clouse, Peter Morse, E. W. Dyer, Parsons Shaw, A. C. Crockett, E. E. Flanders, Eliska M. Gavin, Stephen Sheffield, C. A. Whittemore, F. Gardner, Charles Monnike, Carl Reinisch, David K. Horton, George Henninger, J. M. Cook, O. H. P. Forker, I. N. Lamson, George D. Hayes, A. A. Groat, R. H. Longshare, J. G. Shaw, Julian Field, C. E. Foss, Otto Sollner, A. B. Story, L. E. Allen, C. F. Chadwick, A. R. Schulenburg, James W. Jackson, John H. Ferry, Frank W. Hedges, A. V. Bills, C. L. Barber, A. J. Stokes, T. E. Walker, A. J. Grainger, E. P. Hammack, Wah Hong, Edward Gulick and William Gulick and Henry  
 2 Gulick, Partners, Doing Business under the Firm Name of Gulick Brothers; John J. Jones, Wm. D. Webber, W. F. Stearns, W. J. Henderson, P. W. Morse, O. Darling, S. J. Bradt, R. W. Vaughan, E. J. Elliott, M. E. Jennings Verity, J. E. Stephens, R. G. Wallace, George H. Hancock, Frank Howe, I. N. Morse, Emil O. Hoeh, C. S. Johnson, J. H. Clough, George L. Henderson, M. Cox, John Johnson, A. T. Burr, A. M. Jameson, H. E. Klamer, J. H. Dean, P. S. Leisenring, J. M. Johnson, Ah Quinn, Ah Lit, J. M. Ballou, S. H. Dale, George M. Tutton, E. P. Lounsbury, George W. De Tar, S. D. Foss, Austin Carey, George J. Jecock, D. S. McBean, Quincy A. Petts, Morton Penfield, J. A. Thomas, J. O. Reinhart, William Doyle, F. O. Reinhart, H. I. Atwater, E. H. Woods, N. H. Downs, Edwin S. Belcher, W. G. Terrii, T. G. Ellis, W. M. Carr, D. F. Garrettson and Elisabeth A. Garrettson, Executors of the Estate of G. A. Garrettson, Deceased; George M. Darnell, Flora B. Arndt, J. W. Stearns, P. W. Beck, M. G. Miller, J. F. Morrill, Fred W. Pearson, Sunnyside School District, N. J. Pillsbury, Julia Latta, Mary R. Klamer, Thomas Lindsay, E. P. Carr, I. M. Howe and H. B. Howe, Partners, Doing Business under the Firm Name of Howe Brothers; Arthur Ryan and Michael Mack, Partners, Doing Business under the Firm Name of Ryan and Mack; James H. Forbes, J. A. Pinkerton, S. D. Murdock, W. Weitekamp, John L. Davis, George H. Eaton, George Rippe, J. H. Greife, F. W. Reid, R. S. Harris, Sweetwater School District, L. W. Goff, George Dashbaugh, Henry Walker, C. C. Hughes, Frank A. Kimball, Henry Haberkellner, F. Mederle, L. C. Wright, Cyrus Johnson, A. W. Howard, Laura F. Meyer, George F. McMurry, F. H. Downes, N. W. Downes, Complainants,

vs.

SAN DIEGO LAND &amp; TOWN COMPANY OF MAINE, Defendant.

3 In the Circuit Court of the United States, Ninth Circuit,  
Southern District of California.

No. 839.

H. C. OSBORNE, WILLIAM KNAPP, A. BARBER, MRS. E. L. WILLIAMS, T. M. Eaton, J. M. Davidson, A. J. Smith, A. Hammond, John T. Judkins, Henry Gulick, Sr., H. S. Whittaker, A. Barnett, J. N. Woodward, A. B. Stephens, John Nickson, J. H. Fawcett, Payne Brown, W. E. Montgomery, Monroe Johnson, A. Haines, M. L. Ward, Ella B. Ward, A. Keene, Fred Keene, E. K. Earle, H. F. Earle, Thomas Walker, A. G. White, W. J. Brower, P. B. Smith, F. B. Merriam, H. Hyatt, H. Stegeman, R. S. Harris, A. A. Gooden, G. A. Dukes, C. H. Rippey, Virginia Rippey, C. C. Jobes, J. L. Griffin, Tallie Spencer Sullivan, W. C. Kimball, J. C. Frisbie, S. W. Morgan, George Hannahs, F. B. Webb, John Haberfellner, W. S. Wilkins, S. W. Haines, Chula Vista School District, S. Healey, M. E. Phinney, D. L. Murdock, Dan. P. Stetzelberger, R. P. Middlebrook, Anson Titus, W. A. Henry, J. W. Preston, W. E. Ballinger, J. H. Blakeslee, Herman Banke, J. C. Alles, D. K. Adams, A. J. Morley, C. F. Wiggins, S. F. Dickinson, O. C. Noyes, J. E. Clouse, Peter Morse, E. W. Dyer, Parsons Shaw, A. C. Crockett, E. E. Flanders, Elisha M. Gavin, Stephen Sheffield, C. A. Whittemore, F. Gardner, Charles Monnike, Carl Reinisch, David K. Horton, George Henninger, J. M. Cook, O. H. P. Forker, I. N. Lamson, George D. Hayes, A. A. Groat, R. H. Longshare, J. G. Shaw, Julian Field, C. E. Foss, Otto Sollner, A. B. Story, L. E. Allen, C. F. Chadwick, A. R. Schulenburg, James W. Jackson, John H. Ferry, Frank W. Hedges, A. V. Bills, C. L. Barber, A. J. Stokes, T. E. Walker, A. J. Grainger, E. P. Hammack, Wah Hong, Edward Gulick and William Gulick and Henry Gulick, Partners, Doing Business under the Firm Name of Gulick Brothers; John J. Jones, Wm. D. Webber, W. F. Stearns, W. J. Henderson, P. W. Morse, O. Darling, S. J. Bradt, R. W. Vaughan, E. J. Elliott, M. E. Jennings Verity, J. E. Stephens, R. G. Wallace, George H. Hancock, Frank Howe, I. N. Morse, Emil O. Hoeh, C. S. Johnson, J. H. Clough, George L. Henderson, M. Cox, John Johnson, A. T. Burr, A. M. Jameson, H. E. Klamer, J. H. Dean, P. S. Leisenring, J. M. Johnson, Ah Quinn, Ah Lit, J. M. Ballou, S. H. Dale, George M. Tutton, E. P. Lounsbury, George W. De Tar, S. D. Foss, Austin Carey, George J. Jecock, D. S. McBean, Quiney A. Petts, Morton Penfield, J. A. Thomas, J. O. Reinhart, William Doyle, F. O. Reinhart, H. I. Atwater, E. H. Woods, N. H. Downs, Edwin S. Belcher, W. G. Terril, T. G. Ellis, W. M. Carr, D. F. Garrettson and Elisabeth A. Garrettson, Executors of the Estate of G. A. Garrettson, Deceased; George M. Darnell, Flora B. Arndt, J. W. Stearns, P. W. Beck, M. G. Miller, J. F. Morrill, Fred W. Pearson, Sunnyside School District, N. J. Pillsbury, Julia Latta, Mary R. Klamer, Thomas Lindsay, E. P. Carr, I. M. Howe and H. B. Howe, Partners, Doing Business under the Firm Name of Howe Brothers; Arthur Ryan and Michael Mack, Partners, Doing Business under

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vs.

SAN DIEGO LAND & TOWN COMPANY OF MAINE, Defendant.

*Bill in Equity.*

To the honorable the judges of the circuit court of the United States within and for the southern district of California, sitting in equity:

5 Humbly complaining, show unto your honors your orators,  
H. C. Osborne, William Knapp, A. Barber, E. L. Williams, T. M. Eaton, J. M. Davidson, A. J. Smith, A. Hammond, John T. Judkins, Henry Gulick, Sr.; H. S. Whittaker, A. Barnett, J. N. Woodward, A. B. Stephens, John Nickson, J. H. Fawcett, Payne Brown, W. E. Montgomery, Monroe Johnson, A. Haines, M. L. Ward, Ella B. Ward, A. Keene, Fred Keene, E. K. Earle, H. F. Earle, Thomas Walker, A. G. White, W. J. Brower, P. B. Smith, F. B. Merriam, H. Hyatt, H. Stegeman, R. S. Harris, A. A. Gooden, G. A. Dukes, C. H. Rippey, Virginia Rippey, C. C. Jobes, J. L. Griffin, Tallie Spencer Sullivan, W. C. Kimball, J. C. Frisbie, S. W. Morgan, George Hannahs, Charles O. Brown, F. B. Webb, John Haberfellner, W. S. Wilkins, S. W. Haines, Chula Vista School District, S. Healey, M. E. Phinney, D. L. Murdock, Dan. P. Stetzelberger, R. P. Middlebrook, Anson Titus, W. A. Henry, J. W. Preston, W. E. Ballinger, J. H. Blakeslee, Herman Banke, J. C. Ailes, D. K. Adams, A. J. Morley, C. F. Wiggins, S. F. Dickinson, O. C. Noyes, J. E. Clouse, Peter Morse, E. W. Dyer, Parsons Shaw, A. C. Crockett, E. E. Flanders, Elisha M. Gavin, Stephen Sheffield, C. A. Whittemore, F. Gardner, Charles Mohnike, Carl Reinisch, David K. Horton, George Henninger, J. M. Cook, O. H. P. Forker, I. N. Lamson, George D. Hayes, A. A. Grout, J. H. Bowen, R. H. Longshare, W. O. Bowen, J. G. Shaw, Julian Field, C. E. Foss, Otto Sollner, A. B. Story, L. E. Allen, C. F. Chadwick, A. R. Schulenberg, James W. Jackson, John H. Ferry, Frank W. Hedges, A. V. Bills, C. L. Barber, A. J. Stokes, T. E. Walker, A. J. Grainger, E. P. Hammack, Wah Hong, Edward Gulick and William Gulick and Henry Gulick, partners, doing business under the firm name of Gulick Brothers; John J. Jones, Wm. D. Webber, W. F. Stearns, W. J. Henderson, P. W. Morse, O. Darling, S. J. Bradt, R. W. Vaughan, F. A. Moses, E. J. Elliott, M. E. Jennings Verity, J. E. Stephens, R. G. Wallace, George H. Hancock, Frank Howe, I. N. Morse, Emil O. Hoch,  
6 C. S. Johnson, C. W. Ellsworth, J. H. Clough, George L. Henderson, M. Cox, John Johnson, A. T. Burr, A. M. Jamieson, H. E. Klamer, J. H. Dean, P. S. Leisenring, J. M. Johnson

Ah Quin, Ah Lit, J. M. Ballou, S. H. Dale, George M. Tutton, E. P. Lounsbury, George W. De Tar, S. D. Foss, Austin Carey, George J. Jecock, D. S. McBean, Quincey A. Pettis, Morton Penfield, J. A. Thomas, J. O. Rhinehart, William Doyle, F. O. Rhinehart, H. I. Atwater, E. H. Woods, N. H. Downs, Edwin S. Belcher, W. G. Terrill, T. G. Ellis, W. M. Carr, D. F. Garrettson and Elizabeth A. Garrettson, executors of the estate of G. A. Garrettson, deceased; George M. Darnell, Flora B. Arndt, J. W. Stearns, P. W. Beck, M. G. Miller, J. F. Morrill, Fred W. Pearson, Sunnyside School District, N. J. Pillsbury, Julia Latta, Mary R. Klamer, Thomas Lindsay, E. P. Carr, I. M. Howe and H. B. Howe, partners, doing business under the firm name of Howe Brothers; Arthur Ryan and Michael Mack, partners, doing business under the firm name of Ryan & Mack; James H. Forbes, J. A. Pinkerton, S. D. Murdock, W. Weitekamp, John L. Davis, George H. Eaton, George Rippe, J. H. Greife, F. W. Reid, R. S. Harris, Sweetwater School District, L. W. Goff, George Dashbaugh, William Campbell, Henry Walker, C. C. Hughes, Frank A. Kimball, Henry Haberfellner, F. Mederle, L. C. Wright, Cyrus Johnson, A. W. Howard, Laura F. Meyer, George F. McMurry, F. H. Downs, N. W. Downs, and residents and citizens of the county of San Diego, in the State of California, and in the district aforesaid:

That on the 6th day of January, 1896, Chas. D. Lanning, as receiver of the San Diego Land & Town Company, a corporation organized under the laws of the State of Kansas, hereinafter named, exhibited his bill of complaint in this honorable court against your orators and thereby set forth in words and figures the following, to wit:

*"Bill in Equity.*

To the honorable the judges of the circuit court of the United States within and for the southern district of California,  
7 sitting in equity:

Charles D. Lanning, a resident and citizen of the State of Massachusetts, receiver of the San Diego Land & Town Company, a corporation duly organized and existing under and by virtue of the laws of the State of Kansas, and a resident and citizen of said State, brings this his bill against H. C. Osborne, William Knapp, A. Barber, E. L. Williams, T. M. Eaton, J. M. Davidson, A. J. Smith, A. Hammond, John T. Judkins, Henry Gulick, Sr., H. S. Whittaker, A. Barnett, J. N. Woodward, A. B. Stephens, John Nickson, J. H. Fawcett, Payne Brown, W. E. Montgomery, Monroe Johnson, A. Haines, M. L. Ward, Ella B. Ward, A. Keene, Fred Keene, E. K. Earle, H. F. Earle, Thomas Walker, A. G. White, W. J. Brower, P. B. Smith, F. B. Merriam, H. Hyatt, H. Stegeman, R. S. Harris, A. A. Gooden, G. A. Dukes, C. H. Rippey, Virginia Rippey, C. C. Jones, J. L. Griffin, Tallie Spencer Sullivan, W. C. Kimball, J. C. Frisbie, S. W. Morgan, George Hannahs, Charles O. Brown, F. B. Webb, John Haberfellner, W. S. Wilkins, S. W. Haines, Chula Vista School District, S. Healey, M. E. Phinney, D. L. Murdock, Dan. P. Stetzel-



berger, R. P. Middlebrook, Anson Titus, W. A. Henry, J. W. Preston, W. E. Ballinger, J. H. Blakeslie, Herman Banke, J. C. Ailes, D. K. Adams, A. J. Morley, C. F. Wiggins, S. F. Dickinson, O. C. Noyes, J. E. Clouse, Peter Morse, E. W. Dyer, Parsons Shaw, A. C. Crockett, E. E. Flanders, Elisha M. Gavin, Stephen Sheffield, C. A. Whittemore, F. Gardner, Charles Mohnike, Carl Reinisch, David K. Horton, George Henninger, J. M. Cook, O. H. P. Forker, I. N. Lamson, George D. Hayes, A. A. Grout, J. H. Bowen, R. H. Longshare, W. O. Bowen, J. G. Shaw, Julian Field, C. E. Foss, Otto Sollner, A. B. Story, L. E. Allen, C. F. Chadwick, A. R. Schulenburg, James W. Jackson, John H. Ferry, Frank W. Hedges, A. V. Bills, C. L. Barber, A. J. Stokes, T. E. Walker, A. J. Grainger, E. P. Hammack, Wah Hong, Edward Gulick and William Gulick and Henry Gulick, partners, doing business under the firm name of  
 8 Gulick Brothers; John J. Jones, Wm. D. Webber, W. F. Stearns, H. H. Rice, W. J. Henderson, P. W. Morse, O. Darling, Walter Price, S. J. Bradt, R. W. Vaughn, F. A. Moses, E. J. Elliott, M. E. Jennings Verity, J. E. Stephens, R. G. Wallace, George H. Hancock, Frank Howe, I. N. Morse, Emil O. Hoch, C. S. Johnson, C. W. Ellsworth, Wm. Steckle, J. H. Clough, George L. Henderson, M. Cox, John Johnson, A. T. Burr, A. M. Jameson, H. E. Klammer, J. H. Dean, P. S. Leisenring, J. M. Johnson, Ah Quin, Ah Lit, J. M. Ballou, S. H. Dale, George M. Tutton, — Lounsbury, George W. De Tar, S. D. Foss, Austin Carey, George J. Jecock, D. S. McBean, Quincey A. Pettis, Morton Penfield, J. A. Thomas, J. O. Rhinehart, William Doyle, F. O. Rhinehart, H. I. Atwater, E. H. Woods, N. H. Downs, Edwin S. Belcher, W. F. Terrill, T. G. Ellis, W. M. Carr, D. F. Garrettson and Elizabeth A. Garrettson, executors of the estate of G. A. Garrettson, deceased; George M. Darnell, Flora B. Arndt, J. W. Stearns, P. W. Beck, M. G. Miller, J. F. Morrill, Fred W. Pearson, Sunnyside School District, N. J. Pillsbury, Julia Latta, Mary R. Klammer, Thomas Lindsay, E. P. Carr, I. M. Howe and H. B. Howe, partners, doing business under the firm name of Howe Brothers; Arthur Ryan and Michael Mack, partners, doing business under the firm name of Ryan and Mack; F. E. Leslie and H. P. Whitney, partners, doing business under the firm name of Leslie & Whitney; James H. Forbes, J. A. Pinkerton, S. D. Murdock, W. Weitekamp, John L. Davis, George H. Eaton, George Rippe, J. H. Greife, F. W. Reid, R. S. Harris, Sweetwater School District, L. W. Goff, George Dashbaugh, William Campbell, Henry Walker, C. C. Hughes, Frank A. Kimball, Henry Haberkeller, F. Mederle, L. C. Wright, Cyrus Johnston, A. W. Howard, Laura F. Meyer, George F. McMurry, F. H. Downs, N. W. Downs, and I. P. Dana, residents and citizens of the county of San Diego, in the State of California and in the district aforesaid.

And your orator complains and says that the San Diego Land & Town Company is and was at all times herein mentioned a corporation duly organized and existing under and by virtue of the laws of the State of Kansas and doing business in the State of  
 9 California.

That the said company is and has been during said times

the owner of valuable water, water rights, reservoirs, and an entire water system for furnishing water to consumers for domestic irrigation and other purposes for which water is needed for consumption and of a franchise for the impounding, sale, disposition, and distribution of the waters owned and stored by it to the defendants and other consumers and to the city of National City and its inhabitants.

That its main reservoir and supply of water is and was at the times hereinafter mentioned situate in the Sweetwater river, so called, a small stream in the said county of San Diego, about five miles distant from the city of National City, and its system of reservoir, mains, flumes, aqueducts, and pipes covers and can supply but a limited amount of territory, consisting of certain farming lands within and outside of said National City and in part of the residence portion of said city of National City.

That your orator was on the 4th day of September, 1895, by an order and decree of the circuit court of the United States for the district of Massachusetts, duly made and entered, appointed receiver of all of the property of the San Diego Land & Town Company, with full power to take possession of and manage, operate, and control all of its said property, including the plant and water system in this bill mentioned, and that by an order and decree of this court, duly made and entered on the 30th day of September, 1895, the said first named order and decree was duly confirmed as to all property of said company within the jurisdiction of this court, including said water plant and system, and your orator was by said last-named order duly appointed receiver of said property, with full power and authority to manage and control the same, and,

by virtue of said orders and decrees, your orator took possession of and is managing said property as such receiver.

That the said company has, in procuring the water and water rights, reservoirs, and distributing system owned by it, as aforesaid, and preparing itself to supply consumers with water, expended, up to January 1, 1896, the sum of one million twenty-two thousand four hundred seventy-three and  $\frac{54}{100}$  dollars (\$1,022,473.54), which was reasonably necessary for said purposes.

That by the expenditure of said large sum said company has procured and owns, subject to the public use and the regulation thereof by law, water, water rights, a reservoir site, and a reservoir of the capacity of six thousand million gallons of water, and has constructed and laid therefrom its water mains necessary to supply the defendants and their lands, hereinafter mentioned, and the said city of National City and its inhabitants with water, and has constructed and put in mains, pipes, and all other things necessary to connect said water supply with the premises and buildings of the defendants and each of them and with the premises and buildings of said city and its inhabitants and to furnish them and each of them with water, and was at the time hereinafter mentioned furnishing them and each of them with water.

Your orator further shows that the defendants herein are the owners, respectively, of tracts of land under the system of said

land & town company, most of said defendants owning and holding small tracts of only a few acres each.

That each of said defendants has, by purchase or otherwise, become the owner of a water right—to a part of the water appropriated and stored by said company necessary to irrigate his tract of land—and is liable to pay for the use of said water a yearly rental such as said company is entitled to charge and collect.

That the annual expense of operating and keeping in repair the said reservoir and water system of said company and furnishing said consumers with water is, including interest on its bonds and excluding the natural and necessary depreciation of its system, \$33,034.99.

That in order to pay the said company the amount of its annual expenses and income of six per cent. on the amount actually invested in its said water, water rights, and water system up to the first day of January, 1896, it is necessary that such rates for water sold and consumed be so fixed as to realize to the said company the sum of one hundred nineteen thousand seven hundred ninety-one and  $\frac{1}{100}$  dollars (\$119,791.66).

That the total amount that was realized by the said company from sales of water and water rights and from all other sources on account of its business of supplying water to consumers, as aforesaid, outside of the said city of National City for the year ending January 1st, 1896, was about fifteen thousand dollars (\$15,000.00), and no more than that sum can probably be realized for the year ending January 1st, 1897, at the rates now prevailing.

That all of the mains and pipes of the said company and other parts of its property so used in furnishing water to consumers are perishable property and require to be replaced at least once in sixteen years and require frequent repairs.

That in order to acquire said water and water rights and construct its said system of water works said company was compelled to and did borrow large sums of money, to wit, three hundred thousand dollars (\$300,000.00), and it is compelled to pay as interest thereon the sum of twenty-one thousand dollars (\$21,000.00) annually, which sum must be realized from the sale of its water and is a part of its operating expenses; that the proportionate share of the revenue of the said company that should be raised by water rates within the limits of said National City, as compared with the revenues that should be raised and paid as water rates by consumers outside of said city, is about one-third.

That the amount that can be realized from said city and its inhabitants per annum from the rates now prevailing under the ordinance hereinafter mentioned is about ten thousand seven hundred and fifteen dollars (\$10,715.00) per annum and no more.

That the value of the water, water rights, reservoirs, franchises, and property necessary for the proper operation of its business and now owned by said company is one million one hundred thousand dollars (\$1,100,000.00), and the same is necessary for the use of the

said company in furnishing water to said defendants and other consumers.

That no other person or corporation is or ever has been furnishing a supply of water to said defendants and other consumers, nor is there now nor has there been any other system of water works by which said defendant can be furnished with water, but the franchise and right of the company to furnish water to said consumers is not exclusive of other persons or corporations.

That the said city of National City is a municipal corporation of the sixth class organized under the general laws of the State of California, and the rates to be charged for water within said city are fixed by the board of trustees of said city, as provided by the laws of the State of California; that on the 20th day of February, 1895, the said board of trustees, assuming and claiming to act under and in accordance with the constitution and laws of said State, passed and adopted an ordinance of said city fixing the water rates to be charged for water sold and furnished by said company to consumers within said city.

Your orator further shows to your honors that said land & town company commenced to furnish water to consumers in the year 1787; that it was informed by its engineer that its system and the supply of water that could be stored thereby would furnish water to consumers sufficient to irrigate twenty thousand acres of land and supply such water, in addition thereto, as would be nec-

13      essary for domestic use inside and outside of said city of National City; that the company was then unfamiliar with the operation of a plant and system of the kind constructed by it, and did not know what the cost of operating and maintaining the same would be; that, relying upon the said report and estimate of its engineer as to the probable duty of its reservoir and the capacity of its said system and believing that by fixing and charging an annual rate of \$3.50 per acre for irrigation it could meet its operating expenses and pay it some interest on its investment, it fixed and established and has since charged said rate of \$3.50 per acre per annum and no more until January 1st, 1896; but your orator further shows to your honors that instead of being able to supply from its said system sufficient water to irrigate twenty thousand acres it has been demonstrated by its actual experience that said system will not supply water sufficient to irrigate to exceed seven thousand acres, together with the water demanded for domestic use, and it is believed not to exceed six thousand acres, although there are about ten thousand acres under said system susceptible of irrigation.

And your orator further shows that at the rate of \$3.50 per acre, if water should be demanded and used upon the whole of the lands which the system is able to supply with water and rates are allowed to said National City equally high for domestic use and irrigation, said company would not be able to pay its operating expenses and maintain its plant and system, and that said company has been and still is, under said rates, losing money every year, and its said plant and system has been and is gradually going to decay from natural

depreciation consequent upon its use and supplying consumers with water without any revenue or means being provided for replacing the same, whereby the said system and the money invested by said company therein will be wholly lost to it, and it will, if said rate of \$3.50 per acre is maintained, be compelled to furnish water to consumers at an actual and continual loss.

14 Your orator further shows that in order to pay the cost of operating the plant of said company and maintain the same and pay said company a reasonable interest on its investment in said plant, or a reasonable sum for its services in supplying water to the defendants and other consumers, it will be necessary for it to charge a rate per acre per annum of not less than \$7.00 for irrigation purposes; that said sum of \$7.00 per acre is a reasonable rate for consumers to pay and the smallest amount for which said company can furnish the water without loss to it.

Your orator further shows that by the laws of the State of California the board of supervisors may, upon the petition of twenty-five inhabitants and tax-payers of the county, fix the rates of yearly rental to be collected by any company furnishing water to consumers, but no such petition has ever been presented or rates fixed in the case of the said land & town company.

Your orator further shows that for the reasons above stated said land & town company gave notice to the defendants that on January 1st, 1896, it would establish a rental of \$7.00 per acre per annum for water supplied to their and each of their lands for irrigation, and that from and after said date they and each of them would be required to pay said sum for the irrigation of their and each of their lands, and your orator, after his appointment as receiver, as aforesaid, and before said date, gave a similar notice.

Your orator further shows that the said defendants and each of them have refused to pay said rate of \$7.00 per acre, and maintain that neither the said land & town company nor your orator, as receiver thereof, have any legal right to increase the amount of rental to be paid by them or any of them, and that the rate of \$3.50 established and collected by the said land & town company must be and remain the established rate of rental until a rate

15 is established by the board of supervisors of the county in which said plant is situated, as provided by law.

Your orator further shows that an increase of the rate for such rentals is absolutely necessary to enable him to maintain and operate said plant and pay the expenses of such maintenance and operation as he is required by law to do.

And your orator further shows that in order to enforce the payment of said rentals he has, as he is authorized by law to do, caused the water to be shut off from the premises of the defendants and each of them until such rentals are paid, and said defendants threaten to and will, unless restrained from so doing by this court, commence suits in the superior court of the county of San Diego, State of California, to compel your orator to turn on and furnish water to their said lands without the payment of \$7.00 per acre rental on the ground that they are entitled to the use of said water for \$3.50 per



acre, the rate heretofore prevailing, and for damages for cutting off their said supply of water; that the rights of said defendants are the same, and the determination of the question of the right of said land & town company and of your orator to increase the rate of rental to be charged and collected will affect all of the said defendants in the same way and to the same extent, except that the quantity of land owned by the several defendants is different.

And your orator further shows to your honors that the bringing of said suits by said defendants separately will involve the said land & town company, your orator, and said defendants in a multiplicity of suit- and put them and each of them to great and unnecessary cost and expense, and will seriously hinder your orator in the proper operation and management of the property of said company and the settlement of its outstanding debts, liabilities, and obligations, when all of the questions involved in such litigation and the rights

16 of all of the parties in interest can be better settled and determined in one suit, and vexatious litigation and unnecessary expense and unnecessary interference with your orator's management and control of the property and business of said company be thereby avoided.

Your orator further shows that the proposed increase in rates will add to the revenue and earnings of said company from the sale and distribution of the water from its said system, with the amount of land now under irrigation, not less than \$14,000.00 per annum, and upon the whole of the lands that can be irrigated by the system of the company of not less than \$21,000.00 per annum.

Your orator further shows that, as he is informed and believes, the defendants Chula Vista School District, Sunnyside School District, and Sweetwater School District are corporations duly organized and existing under the laws of the State of California; the defendants Edward Gulick, William Gulick, and Henry Gulick are partners, doing business under the copartnership name of Gulick Brothers; the defendants D. F. Garrettson and Elizabeth A. Garrettson were, on the 5th day of September, 1895, by an order of the superior court of the county of San Diego, State of California, duly made and entered, appointed executors of the estate of G. A. Garrettson, deceased, and duly qualified as such executors and are now acting as such; the defendants I. M. Howe and H. B. Howe are partners, doing business under the copartnership name of Howe Brothers; the defendants Arthur Ryan and Michael Mack are partners, doing business under the copartnership name of Ryan and Mack, and the defendants F. E. Leslie and H. P. Whitney are partners, doing business under the firm name of Leslie & Whitney.

Wherefore your orator prays your honors to grant to him the writ of injunction against the defendants and each of them, enjoining them from prosecuting in the State courts or elsewhere separate actions against your orator or said land & town company; that  
17 said defendants and each of them be required to appear in this suit and set up any claims they may have against the right of your orator or said company to increase the rental for water furnished by said company, as aforesaid, and that it be

finally decreed by this court that your orator, as such receiver, and said company have the right to increase the amount of its rentals to any reasonable sum, and that the sum of \$7.00 per acre per annum is a reasonable rental to be charged, and that the defendants and each of them be required to pay said rate as a condition upon which water shall be furnished to them, and that your orator shall have generally such other and further relief as the nature of his case may require.

Therefore will your honors grant unto your orator the writ of subpoena issuing out of and under the seal of this court, to be directed to said defendants, commanding them and each of them by a certain day and under a certain penalty therein inserted to appear before your honors in the circuit court aforesaid, and then and there answer the premises and abide the order and decree of the court.

WORKS & WORKS,  
*Solicitors for Complainant.*

STATE OF CALIFORNIA, } ss :  
County of San Diego, }

John E. Boal, being duly sworn, says that he is the agent of the receiver of The San Diego Land & Town Company, complainant in the above-entitled cause; that he has read the foregoing bill in equity and knows the contents thereof; that the same is true of his own knowledge, except as to the matters which are therein stated on information and belief, and as to those matters that he believes it to be true.

JOHN E. BOAL.

Subscribed and sworn to before me this 4th day of January, 1896.

[SEAL.]

LEWIS R. WORKS,  
*Notary Public in and for the County of San Diego,  
State of California."*

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And your orators having appeared in said cause, and having put in an original answer, an amended answer, and a supplemental answer, and the whole of the same having been expunged from the record upon exceptions filed by the said C. D. Lanning, receiver, complainant therein, for irrelevancy and impertinence, and your orators having been directed to make further answer, your orators did, upon the 13th day of September, 1897, put in and file their further answer and supplemental answer to said bill in words and figures following, to wit:

(After title of cause and commencement of answer in the usual form.)

The court having sustained exceptions to the original answer, and to the amended answer, and to the supplemental answer heretofore filed for irrelevancy and impertinence, and having expunged the same, and having also sustained exceptions for insufficiency and directed further answer to be made by the defendants herein, now

these defendants, saving and reserving unto themselves the benefits of all exceptions to the errors and imperfections in the bill contained, for further answer and supplemental answer to so much thereof as they are advised it is necessary or material for them to answer to, do aver and say that—

They admit that the San Diego Land & Town Company is and at all times mentioned in the complaint was a corporation duly organized and existing under and by virtue of the laws of the State of Kansas and doing business in the State of California; and they aver that the corporate powers of said corporation, as declared in its articles of association, are as follows, to wit:

“The purpose- for which this corporation is formed are the encouragement of agriculture and horticulture, the maintenance of public works, the maintenance of a public and private cemetery; the purchase, location and laying out of town sites and  
19 the sale and conveyance of the same in lots and subdivisions or otherwise; the supply of water to the public; the erection of buildings and the accommodations and loan of funds for the purchase of real property; the establishment and maintenance of a hotel; the promotion of immigration; the construction and maintenance of sewers; the erection and maintenance of market-houses and market places; the construction and maintenance of dams and canals for the purpose of water works, irrigation or manufacturing purposes; the conversion and disposal of agricultural products by means of mills, elevators, markets and stores, or otherwise; the accumulation and loan of funds; the erection of buildings and the purchase and sale of real estate for the benefit of its members. And the construction and maintenance of such other improvements as may be necessary or desirable for the proper exercise of any or all such corporate purposes.”

They deny that said corporation is or at any time was the owner of any water or water rights or reservoir or any water system, as alleged in the bill of complaint, except as hereinafter set forth, or that it is or at any time was the owner of any water or water rights or reservoirs or any water system for or devoted to any purpose except as hereinafter set forth.

They admit and say that said company became, as hereinafter set forth, the owner of a dam, reservoir, and an entire water system adapted to the furnishing of water for domestic, irrigation, and other purposes for which water is needed for consumption, and of the corporate franchise, as in its said articles of incorporation set forth; and they say that said dam and reservoir are entirely on land, constituting part of the bed of the Sweetwater river, and on riparian land on both sides of said river, contiguous thereto.

That said corporation became the owner in fee-simple of  
20 the ground occupied by its dam, reservoir, pipe lines, and conduits, and all the real estate occupied by its water system, by private grants to it from the owners thereof by mesne conveyances from the owners of the Mexican grants in said San Diego county, known as the Rancho de la Nacion and the Jamacha rancho; that it acquired the title to all the said land occupied by its reservoir

prior to 1886, except a tract of three hundred and fifty-five acres in the extreme upper end of the reservoir, which it acquired in 1891 by grant to it from George H. Neale and wife, the then owners.

That said Rancho de la Nacion contains 26,631.94 acres of land and has its western boundary on San Diego bay, a navigable water of the Pacific ocean, from whence it extends eastward about seven miles, and that the patent for said rancho was duly issued by the United States Government on February 27th, 1866.

That said Jamacha rancho adjoins said Rancho de la Nacion on the east and contains two square leagues of land; that the said grant was duly confirmed by the district court of the United States for California on March 9th, 1858, and that the United States duly issued a patent conformably thereto.

That the said Sweetwater river flows westerly through said Jamacha rancho, and, pursuing the said course, passes from it into said Rancho de la Nacion, and, flowing nearly through the center of said last-named rancho for about seven miles, has its mouth therein, where it empties into San Diego bay at the western boundary of said last-named rancho.

That on the 9th day of June, 1869, Frank A. Kimball and Warren C. Kimball were and for a long time prior thereto had been the owners in fee of said National rancho, and of all and singular the bed of the said Sweetwater river, and of all the land on each side thereof and contiguous thereto in said Rancho de la Nacion  
21 from the eastern boundary thereof, being also the western boundary of said Jamacha rancho, downward, along, and upon the said Sweetwater river to the place where it empties into the bay of San Diego.

That afterwards, as early as the year 1881, said company acquired title in fee to all the waters then flowing and thereafter to flow in said Sweetwater river in and through said Rancho de la Nacion, with the right to divert the same from its natural channel at any point or points in said rancho, by a regular chain of mesne grants and conveyances under a grant and conveyance of the same made by said Frank A. Kimball and Warren C. Kimball, on said 9th day of June, 1869.

That by reason of the premises the said company became the owner in fee-simple of all the water in and riparian rights on the said Sweetwater river and of the bed of said river from the highest flowage point of its reservoir, in said Jamacha rancho, down to said San Diego bay, and that it acquired such ownership prior to the year 1886, except as to that portion thereof at the extreme upper end of said reservoir, acquired from said Neale and wife in 1891, as aforesaid.

That, pursuant to the provisions of title VIII of the Civil Code of California, said company caused to be posted and recorded in Book One (1) of the Record of Water Claims for San Diego County notices each respectively of the appropriation of 5,000 inches of water of said Sweetwater river at the location of said dam; one of said notices in the month of September, 1886, recorded at page 171; one in the month of September, 1887, recorded at page 178; one in the

month of April, 1887, recorded at page 248; all in said Book One (1).

That each of said notices contained the designation of the purposes for which the said water was claimed in the words following, to wit:

“The purposes for which said undersigned claims said water are to supply for culinary and irrigation purposes the watering  
22 of live stock and other domestic uses to the lands north and south of the Sweetwater river and adjacent thereto.”

That in the month of August, 1888, said company in its own name posted and filed for record a notice of appropriation of 75,000 inches of continuous flow of said Sweetwater river for the purposes set forth in said notice in words following, to wit:

“The purposes for which said water is claimed *is* to divert *an* and distribute the same through pipes, flumes, ditches for the purpose of irrigation, domestic, manufacturing, and such other uses and purposes as may be practicable and expedient.”

But defendant avers that at the time of the filing and recording of each of said notices of appropriation and of the commencement of the construction of said irrigation system the riparian land on said Sweetwater river and its tributaries and the beds thereof above the reservoir were substantially all in private ownership, and almost none of said riparian land or beds of the streams were public lands of the State of California or the United States.

And defendants say that in November, 1886, the said corporation commenced the construction of its dam to impound and store said water in its said reservoirs, and thereafter prosecuted work upon the same and upon its system of mains and lateral pipes for furnishing said water for use and consumption, and by February, 1888, had completed the same.

That the location of said dam is across the channel of said Sweetwater river, at a point within the boundaries of said Rancho de la Nacion, about one-fourth of a mile west from the eastern boundary thereof, and is so located that the whole reservoir, capable of being filled by the same, is on lands so acquired by said company in said Rancho de la Nacion and Jamacha rancho.

That the capacity of said reservoir is six thousand million gallons, and that the water system of said company covers and can supply about 9,000 acres of the 12,000 acres of territory there-  
23 under, consisting of certain farming lands within and outside of said National City; and, in addition to supplying said 9,000 acres, can supply the domestic uses and needs of a population, when settled upon said lands within and without said National City and on village property within said city, of 20,000 persons.

And defendants admit that said company has, in acquiring the water rights, reservoir, and distributing system as aforesaid and in preparing itself to supply said water, expended up to January 1st, 1896, a considerable sum of money, but how much they have neither knowledge, information, or belief (and they deny that it is material or relevant that they should answer as to what sums of money were expended for such purposes).



And these defendants say that the right and title of said company to said reservoir and system for furnishing water therefrom to consumers for domestic, irrigation, and other purposes, and of impounding the same, and for the sale and distribution of the waters stored by it, and for collecting rates and compensation therefor, so acquired by it as aforesaid, are subject, nevertheless, to the water rights, easements in, and servitudes upon said reservoir and system, and to all other rights acquired by these defendants therein as aforesaid and annexed to the respective parcels of lands of these defendants.

Defendants each, except the defendants C. H. Rippey and M. L. Ward, admit that they are each the owners of tracts of land under the said water system of said land & town company, and that most of these defendants own and hold small tracts of only a few acres each, and they say that none of them owns to exceed twenty-five acres irrigated from said system, except Warren C. Kimball, who owns about seventy acres, and that each of said defendants owns his and her tract in severalty, except as follows: The defendants Edward Gulick, William Gulick, and Henry Gulick own twenty acres of land as tenants in common. The defendants 24 J. M. Howe and H. O. Howe own twenty acres of land as tenants in common. The defendants Arthur Ryan and Michael Mack own ten acres as tenants in common; and the defendants F. E. Leslie and H. P. Whitner own ten acres as tenants in common.

These defendants admit, and each for himself and herself admits, that each defendant owning land as aforesaid has become the owner of a water right to a part of the water appropriated and stored by said company necessary to irrigate his and her said land.

And they say, and each says, that said water rights owned by the defendants respectively extend not only to the irrigation of the said respective tracts of land, but also to supplying the needs of persons resident and of animals kept thereon respectively.

And they say that each of their said water rights embraces the right and easements of the service of the reservoir and distributing system of said corporation for the delivery of the water at and upon their respective lands for all of said uses by the automatic gravity pressure existing under said system, and that each such water right and easement is in freehold and is a freehold servitude imposed upon said water system for the benefit of the land to which it is appurtenant, and that all claims and demands of said company for the price or compensation therefor has been paid or otherwise satisfied by purchase or otherwise as in the bill of complaint alleged.

And these defendants further say that said water rights extend to and include the right to have said corporation maintain said system efficiently to conduct the water to and deliver the same on the premises of each of the defendants for irrigation and other uses at and for the annual rates to be deemed and accepted as the legally established rates therefor under the facts hereinafter set forth.

25 And defendants admit that at the times mentioned in the bill of complaint the said company was furnishing them and each of them with water through its said system.

And these defendants say that of the said 12,000 acres of farming and orchard lands lying under said reservoir and within the reach of water supply therefrom the said corporation, in January, 1887, owned and for a long time prior, to wit, since the year 1869, had owned and held, for the purpose of sale, use, and profit, about seven thousand acres.

And, further answering, these defendants say that the lands of said corporation owned by it in January, 1887, as hereinbefore stated, irrigable from its said reservoir and distributing system, as so constructed, are situate in the Sweetwater valley, in Chula Vista and in National City, all within the boundaries of National ranch, in said city of San Diego; also in Otay valley, in said county, adjoining said National ranch on the south, and in the territory known as ex-Mission lands, adjoined to National City on the north, and that said lands, together with the said town lots owned by said company as aforesaid, *from* virtually one continuous tract, extending from near the base of the said Sweetwater reservoir westward to the bay of San Diego and from the Otay valley on the south to the municipal boundaries of the city of San Diego on the north and west thereof.

That the lands as owned in January, 1887, by others than the said company are in detached parcels scattered among said lands of the said company.

And they say that said lands of said corporation were, in January, 1887, entirely unsettled and in their wild and natural state, and were almost entirely arid and of but little value without water for irrigation.

That the said lands belonging to others than said company were also at said date largely unsettled and in their wild and natural state and were of the same general character with those of said company.

26 And these defendants say that the San Diego Land & Town Company acquired its said water, water rights, reservoir site, reservoir, and distributing system for the purpose of devoting the same, first, to irrigate its own lands aforesaid and to supply the needs of inhabitants of said land who should be induced to purchase said lands from it as lands under irrigation and to be settled on said lands.

And that the object of said company in acquiring and constructing said water system was to enable it to sell its said lands as irrigated lands, with the easement of the perpetual flow and use of the water necessary and useful to irrigate the same, and to supply all the beneficial uses of the people who should settled upon them, annexed as appurtenants in freehold thereto, and to create the freehold servitudes upon its said water system corresponding to such easements.

And defendants aver that said water, water rights, and said water system, to the extent necessary and useful for the irrigation of the

lands of said company, became a part of said land and became merged in the estate of said company in said realty as one estate.

And they say that, subject to the foregoing purposes, the said San Diego Land & Town Company devoted and appropriated the remainder of its said water, water rights, and the capacity and service of its reservoir and whole water system to the sale, rental, and distribution of the use of water to the public.

And these defendants say that said land & town company, in part execution of its said first and primary purpose, object, and project for selling its own lands, laid out and platted its tract of lands known as Chula Vista, which consisted of about five thousand acres, in blocks of forty acres each, and bounded each such block by avenues and streets, and subdivided said blocks into lots of five acres

27 each and laid pipes through seven avenues therein, each about three miles in length and separated from each other one-fourth of a mile, and also piped said Chula Vista at right angles with said avenues at the distance of every mile in the street crossing said avenues, and by said means said company's distributing system was made sufficient to reach and serve with water each five-acre lot on said Chula Vista tract, and also reach its farming lands lying within the said city of National City, and extended pipes from its said system through said National City to serve and irrigate 390 acres of said ex-Mission lands outside and to the northward of the same, and that, in still further execution of said project, the said company laid pipes in the Sweetwater valley and elsewhere in National ranch, in the Otay valley, and in the tract known as ex-Mission, to reach and within reach of its said lands there situated.

And, further answering, these defendants say that nine-tenths of the said company's distributing pipe system aforesaid, when laid and ready for operation in February, 1888, was so laid in anticipation of future use and demand for water supply and not for any use or demand then existing, and that when laid it was, and to a great extent still is, ahead of the demands therefor, and that much thereof has laid unused.

And, further answering, the defendants say that from the time when said corporation entered upon the enterprise of constructing said water system it has at all times advertised in print and in writing subscribed by it and held its said farming and orchard lands for sale, and up to January 1st, 1896, did, as an inducement to the purchase thereof, both privately and publicly and continuously, in writing subscribed by it and otherwise, represent that the water of its said system was piped to and over said lands and lots, and was and would be supplied to purchasers thereof in abundance for irrigating the same at the rate of \$3.50 per acre per annum for farming and orchard lands.

28 And, further answering, these defendants say that the said corporation, since the early portion of the year 1887 and up to January 1st, 1896, had at all times kept its said land continuously on the market for sale, with and under said representa-

tions as to water supply thereof and as to the annual rate for the same for irrigation.

And, further answering, these defendants say that the lands of said corporation situated in the Sweetwater valley, in the Otay valley, and in the ex-Mission, consisting of about 5,700 acres, without the appurtenant water supply under said system, have at no time been worth more, in case purchasers could be found, than an average of \$35.00 per acre, and that its land in Chula Vista, comprising about 5,000 acres, as aforesaid, as so laid out and platted, without the appurtenant water supply under said system, have at no time been worth more, in case purchasers could be found, but rather less, than an average of 75.00 per acre, and that its lands, other than town lots, situate within said city of National City, comprising about 900 acres, without the appurtenant water supply under said system, have at no time, in case purchasers could be found, been worth more, but rather less, than an average of \$100.00 per acre.

That by reason of said appurtenant water supply the said corporation regarded and treated the value of said lands and lots as proportionately enhanced, and that accordingly it has at all times since early in the year 1887 held its raw lands, including the annexed perpetual easement water supply from its said water system, in said Sweetwater valley, in said Otay valley, and in said ex-Mission, at an average of \$250.00 per acre, and has at all times held its raw lands in Chula Vista, with the said annexed water supply, at prices ranging from \$300.00 to \$500.00 per acre, except that it offered and sold about six five-acre tracts of its Chula Vista lands at \$150.00 per acre, as an inducement to the first few purchasers to locate thereon,

and has at all times held its lands within said city of National City, together with the water supply annexed, at \$350.00 to \$500.00 per acre, and has held its lands, where improved by it with the aid of said appurtenant water supply, outside of the value of improvements on the same basis of valuation for the land and water.

And these defendants, further answering, say that, at said prices and under said representations that the annual rate for water for irrigation was and would be \$3.50 per acre, said corporation had, up to the date of the filing of the bill of complaint herein, sold to certain of the defendants and their predecessors in title, severally, parcels of said irrigated lands outside of National City aggregating about twelve hundred acres, with the freehold easement of water supply annexed as an incident and appurtenant to the land granted, and that in cases of the purchase of each such parcel of land each purchaser thereof respectively relied upon said representations of said corporation that the annual rate for water to be supplied for irrigation was and would remain not higher than \$3.50 per acre, and that in each case of such parcel of land so sold said corporation, prior to making its conveyance of the same to said purchasers, connected said lands with the actual flow of water from said system, both for irrigation and domestic and other uses, for persons and animals thereon, and in respect of lands in said Chula Vista so sold by said corporation that it exacted from and imposed upon

each of said purchasers of a tract from it his obligation to erect a residence house thereon at once, to cost not less than \$2,000.00.

And these defendants, further answering, say that up to December, 1892, said corporation made no express or separate grant of "water rights" as appurtenant to such of said land up to that time so sold by it to certain of these defendants, but granted the easement of the flow and use of water from its said system as an appurtenant of the land sold and granted with such land after

30 it had been connected with the said water system and after the said flow and supply of water had been applied to irrigate the land so sold and to the use of persons living and animals kept thereon, and contracted for and received compensation for the land and appurtenant water right in a single price for both.

That after December, 1892, said corporation in all cases where it sold of its said lands did, by an express contract in writing, specifically sell to those of the defendants who purchased lands from it after that date the appurtenant water right, and that each of such contracts contained the following provisions (the description of the land and the price for the same with water being adapted to each case), to wit:

"That in consideration of the stipulation herein contained, and the payment to be made, as hereinafter specified, the party of the first part," (said corporation) "hereby agrees to sell unto the party of the second part, and the party of the second part agrees to purchase of the party of the first part, the following real estate, to wit: " (Description.) "Together with a water right to the one-acre foot of water per annum for each and every acre of said above-described real estate, to be delivered by the party of the first part through its pipes and flumes at a point — said water to be used exclusively on said real estate, and to become and be appurtenant thereto, and not to be diverted therefrom. Provided, that the party of the first part may change the place of delivery of said water, so long as the same is near the highest point of said land. For which land and water right the party of the second part agrees to pay the sum of — dollars.

"And the party of the second part further agrees and binds —self — heirs, executors and assigns, to pay the regular annual water rates allowed by law and charged by the party of the first part for the water covered by said water rights, whether said

31 water is used or not, and to pay for all water used on said land for domestic purposes, monthly, under such rules and regulations for the delivery of water to consumers as the party of the first part may from time to time make."

And these defendants say that in the character and quality of the appurtenant water rights connected with the land sold by said corporation, as aforesaid, no discrimination exists or has at any time been claimed by said corporation or has at any time been recognized by said purchasers between the lands so sold by it after the inauguration of said water system up to December, 1892, and those sold by it after that date with the express and specific provisions as hereinbefore set forth.

And these defendants, further answering, say that the title to the lands of certain of them, to the aggregate of about nine hundred acres, lying outside of said National City, was not derived from said corporation, and in respect to such lands they say that said corporation furnished water for the irrigation of so much of such land as came into cultivation up to December, 1892, without exacting a price for a water right, but voluntarily annexed the perpetual easement of the flow and use of water from said system to said lands, and voluntarily in all respects has from the beginning of its water service treated and still does treat the same as to water rights in all respects on the same footing as the lands sold by it to other of these defendants or their predecessors in interest, as hereinbefore alleged, and that from the beginning of its water service, in 1887, until now the annual water rates actually established and collected by said corporation for water furnished by it to land not sold by it have been the same as for water supplied to lands sold by it.

And defendants, further answering, say that from and after said date of December, 1892, said corporation refused to furnish water to irrigate other or further lands under said system not owned or sold by it except upon the payment of a sum in gross for the water right over and above the uniform annual rate as actually established and collected from all lands under the system, or in lieu thereof of six per cent. annual interest upon its estimate of the value of such right.

That it first fixed the price of such water rights at \$50.00 per acre and later raised the same to \$100.00 per acre, and that after the same date of December, 1892, it furnished no water to irrigate any lands not sold by it except upon payment of the price fixed by it for a water right under a contract for the sale of such water right containing the following provisions (the filling of the blanks being adapted to each case), to wit:

"That the party of the first part (said corporation) agrees to and does hereby sell to the party of the second part a water right to one acre foot of water per acre per annum, for each and every acre of the real estate hereinafter described, to be delivered through the pipes and flumes of the party of the first part — for the sum of — dollars, payable as follows: —. Provided the party of the first part may at its option change the place of delivery of said water, so long as the same is near the highest point on the lands for which the water is delivered under and in accordance with the rules and regulations established from time to time by the party of the first part. Said water right is sold for the use of and to be appurtenant to the following-described real estate now owned by the party of the second part, in the county of San Diego, State of California, to wit: —, consisting of — acres.

"And it is expressly understood and agreed that the water right hereby sold shall belong to said described real estate and be used thereon, and not diverted therefrom or used on any other lands.

"In consideration of the foregoing stipulations and agreements, the party of the second part agrees and binds —self — heirs, exec-



33      utors and assigns, to pay the sums above specified promptly as the sums, and each of them, falls due, and that — will in all things comply with and perform the terms and conditions of this agreement on — part to be performed, and that — and they will promptly pay all annual water rates and charges for *the* the water to which — is entitled under and by virtue of this agreement, at rates fixed by the party of the first part as allowed by law, and at the times, in the manner, and according to the rules and regulations made and adopted by the party of the first part, the annual rental for the amount of water to which the party of the second part is entitled under this contract, to be paid whether the same is used or not, and also to pay for all water used by — on said land for domestic purposes at the rates fixed by the party of the first part and allowed by law."

And that said company annexed, under said form of contract, the water rights referred to in the bill herein, which are appurtenant to about 400 acres of the lands of certain of these defendants.

And that said corporation at no time has made or claimed, and does not now make or claim, any distinction in respect of the character and quality of the water right or of the annual rates actually established or collected for irrigation between such of the said lands not purchased from it as are furnished with water for irrigation by it, whether under such special contract for water right or without.

And these defendants say that the defendant J. M. Ballou owns his water right, alleged in the complaint, by virtue of a special written contract with said corporation making such water right appurtenant to his land for a valuable consideration by him paid to said corporation and under the provisions as to rates in the words, to wit:

34      " Provided, that said party of the second part shall make application in the form provided by the company, for the use of the water, and use the same under the same restrictions and conditions, and to pay said party of the first part the current rate therefor, as established, for Chula Vista; provided, said restrictions and conditions are not inconsistent with the water right hereby granted to said party of the second part."

And these defendants further say that of their number the owners of the lands to the amount of about 400 acres, which lie in said ex-Mission, and which have annexed to them water rights, as in the complaint alleged, entered into a written contract with said corporation for the use and flow of said water to said lands, and that said contract contains the following provisions:

" The parties of the first part will make application for the use of the water upon the form provided by the party of the second part for that purpose, and pay for the use of the water at the current rates as may be enforced from time to time for supplying lands in National ranch, and subject to the same general rules and regulations."

And, further answering, these defendants say that on or about June 3rd, 1895, said corporation established a classification of lands which had been or which should be provided with water by its system, to take effect July 1st, 1895, and afterwards confirmed the

same to take effect January 1st, 1896, and that said classification has been adopted by the complainant receiver and is in words following, to wit:

"Tenth. For the purpose of fixing rates for irrigating acre property the lands of that character are classified as follows:

"All lands to which the easement and flow of water for irrigation has been or shall be annexed by the consent or voluntary act of this company shall constitute the first class.

"All lands to which the easement and flow of water for irrigation has not been or shall not be annexed by the consent or voluntary act of this company shall constitute the second class."

35 And in respect of said second class of lands it at the same time promulgated the following, to wit:

"In addition to said annual rate for water used upon lands of said second class, there shall be paid upon the lands of said class an annual charge equal to six (6) per centum of the value of the right to said easement and flow of water for irrigation, which said value is to be taken as one hundred dollars (\$100.00) per acre."

And these defendants say that the lands of each and all of the defendants fall within the first class so defined by said corporation and said receiver.

And these defendants further say that said corporation has planted and improved other considerable tracts of its said lands still owned by it, aggregating about 1,500 acres, outside of said National City and about 75 acres within said city, and has used and is using thereon water supplied from its said system as appurtenant to said land and for cultivating the same, and also holds said lands, with such appurtenant easement of water supply, for sale, and that said corporation retains the remainder of its said lands under said system, comprising about 4,000 acres, to which water has not actually been applied, at valuations not less than hereinbefore stated for raw land, with the incident and easement of water supply annexed, and has refused and at all times refuses to dispose of the same without including said water supply, except on the conditions that purchasers would pay to complainant the price for said lands so fixed by it, and to include the price of a water right or interest at six per cent. per annum on the price of such water right, at the option of the purchaser.

And they further say that in estimating the annual income 36 from water rents under its system said corporation has, from the beginning of its said water supply, treated its said lands so actually irrigated by it as being precisely on the same footing as to annual rates with the lands of each of these defendants, and has entered up upon its books the same rate per acre per annum as chargeable to said lands as that charged to the lands of defendants, and that said receiver has done and does in all things do likewise.

And they say that in the classification aforesaid made by said corporation and its receiver no discrimination is made or at any time has been made between lands of the first and second class in respect of the annual rate, and that the said additional charge of six per cent. per annum upon the value of such water right applies

only to such lands as shall receive the use and flow of water from said system for irrigation upon demand of their owners to share in that part of the said waters appropriated by said corporation to the public use in the cases where the owners shall not have paid or secured to be paid, by contract or convention with said corporation, the gross sum demanded by it for the sale and conveyance of the water right for such lands, and they say that none of the lands of these defendants now under irrigation fall within the second class.

And these defendants say that they have each accepted and concurred in and do accept and concur in the said classification of lands as made by said corporation and receiver, and that the same has become established, and that the same is just, equitable, and reasonable as between said corporation and all the land-owners under said system.

And these defendants say that the aggregate number of acres of land now under irrigation from said system, including those of these defendants, of said corporation, and of all others, does not exceed 4,300 acres, or one-half of the capacity of the reservoir and distributing capacity of the main pipe lines of said corporation after allowing for the domestic uses of 20,000 persons, and that about 800 acres of said land so irrigated lie in National City.

And these defendants further say that neither of them know, and that neither of them has been informed, save by complainant's said bill and the statement of said corporation, what is the actual annual expense of operating and keeping in repair the said reservoir and water system of said company and furnishing its consumers with water, exclusive of the alleged interest of seven per centum of \$300,000.00 of the bonds of said corporation referred to in said bill, but that, upon such information, they are informed and believe, and therefore allege, that the said annual expenses do not exceed the sum of \$12,034.99, as stated in the bill of complaint herein.

And they aver that the "natural and necessary depreciation of its system" referred to in the bill of complaint is made good by the keeping of the same in repair, the cost of which is included in the annual charges, and they say that, as shown by the books of said corporation and its official reports, the aggregate, under the head of its accounting for "water service," "maintenance of pipe lines," "maintenance of Sweetwater dam," and "expenses" for the years ending December 31st, 1890, 1891, 1892, 1893, and 1894, were respectively \$8,015.48, \$13,002.46, \$11,395.17, \$11,410.48, and \$7,850.18.

And, answering upon such information, they allege that the amounts so actually realized from the whole system for water rentals alone, exclusive of any proceeds of the sale of water rights during said year, did not fall below \$25,715.00, and they say that at the same rates the amount that will be realized by said corporation from the annual rentals under said system, exclusive of any sums derived from the sale of water rights, will not, for the year ending January 1st, 1897, fall below \$27,000.00; and the defendants say and each

38 of them says that the amount of \$25,715.00 was collected as water rentals for the year ending January 1, 1896, for the several purposes for which water was used from the said company's system, with the irrigation rate fixed at three and one-half dollars per acre per annum, and that the sum of twenty-seven thousand dollars is the measure of the yield for the year ending January 1st, 1897, from the said rentals, with the rate for irrigation fixed at the same annual rate of \$3.50 per acre and with but two-thirds of the capacity of said system in use.

And they further say that the said amounts actually realized annually from water rents under said system are derived from sums paid in respect of the lands owned by others than the said corporation and the rentals attributed to the lands owned by said corporation actually under irrigation, and that no part thereof has at any time been derived from or attributed to the lands of said corporation, whether still owned by it or heretofore sold by it, so long as the same were not or still are not actually irrigated.

And defendants further say that they are informed by the records and official reports of said corporation, and therefore aver the fact to be, that on January 31st, 1894, the net balance of its actual receipts from water rentals, based on collections actually made from lands actually irrigated, both those sold and those never owned by the company, and sums charged to lands owned by the company actually irrigated from February, 1888, to said December 31st, 1894, accumulated in its hands to the credit of said water system, after deducting the items of "expenses," "maintenance of pipe line," and "maintenance of Sweetwater dam," was \$49,699.28.

But they say that said net balance to the credit of said water company's department on said December 31st, 1894, does not include any charge, rate, or assessment to the lands of said corporation which at any time were not or that now remain unirrigated.

39 And these defendants deny that the annual expenses of said corporation to operate and maintain its water system exceed the sum of \$12,034.99, as in the bill of complaint alleged.

But these defendants, further answering, say that they deny that said corporation is entitled to demand or receive from these defendants any sums whatever, by way of water rentals, in behalf of or to apply upon the said demanded income of six per cent. or any net income on the alleged cost of said water system.

And they deny that they or either of them own their said water rights in and under said water system subject to any obligation, legal or equitable, other than such as arises from the actual rates established, as aforesaid, and collected by said company, which, in case of their lands, is \$3.50 per acre per annum.

And they deny that the compensation to said corporation for either of their respective water rights, easements, or servitudes aforesaid were or are still subject to regulation by any board of supervisors of this State, as provided in said act of 1885.

They aver that such of their number as have purchased their said lands, with water rights appurtenant thereto, from said corporation and such of their number as have purchased of said corpora-

tion water rights made appurtenant to their lands, not bought of the corporation, have each and all paid the full amount demanded by said corporation as the price of the perpetual easement of water supply from said company's water system by said company granted and annexed to such lands. They aver that such easements are respectively servitudes upon said company's water system and have been fully paid for, and that the owners of said lands are forever discharged and acquitted from payment of any further sum or sums to apply on the principal of or as income upon the cost or value of said water system or any debt incurred by said corporation for construction thereof or the value of their respective water rights.

40 And they allege that said company, in each of said cases where water was devoted to the public use, received satisfaction for from and parted with to each of said defendants or to his or her predecessor in interest all right to demand and collect water rentals proportioned to said lands as corresponded or related to interest or income on the cost or value of said system or to net annual receipts and profits thereon or therefrom.

And that in said respects it has at all times put all other lands to which it has voluntarily annexed said water rights upon the same footing, and that all such lands have remained on the same footing for more than five years; that said lands have in many cases changed owners while so supplied with water at the same rates and on the same footing as to water rights with the land sold by the said company with annexed water rights, as aforesaid; that the value of said water rights has for more than five years entered into the market value of said lands and has in all cases been paid for to their vendors by the present owners, these defendants, who are successors in title by mesne or immediate conveyances of the lands to which, during the former ownership, the company voluntarily annexed said perpetual easement and water rights, and that neither any such lands nor the owners of any thereof are in any event liable for any other or further water rentals than are the lands the ownership of which, with said water rights, were derived from said corporation.

And these defendants, further answering, say that true it is, as alleged in the bill of complaint, that said land and town company commenced to furnish water to consumers in the year 1887; but they say that its regular water service commenced in the month of February, 1888.

They further say that true it is, as alleged in the bill of complaint, that said corporation did, as early as February, 1888,  
41 and as aforesaid, fix and establish and has since charged the rate of \$3.50 per acre as the annual rate for irrigation and no more until January 1st, 1896.

And these defendants each say that said annual rate of \$3.50 per acre is the only actual rate which has ever been established or that has ever been collected by said corporation or which has at any time been paid or assented to by the consumers under said system

from the said beginning of its water service down to the time of filing the bill of complaint herein.

That said rate so actually established and collected has during more than nine years last past been uniform as to all the lands actually irrigated under said system, and defendants say that it has been uniform and without discrimination in respect of all the lands of these defendants at all times.

And these defendants further say that they were induced to purchase, improve, and settle upon their said respective parcels of land in reliance upon the fact that said rates of \$3.50 per acre per annum for irrigation under said system has during all said period of time been uniformly and actually established and collected by said corporation; and they aver that said irrigation rate has entered into the value of all the land of these defendants and is a material element of such value.

They admit that no other person or corporation is or ever has been furnishing a supply of water to said defendants and other consumers, and that there is not now nor has been any other system of water works by which said defendants can be furnished with water.

And these defendants deny that the capacity of said water system is only sufficient to supply water to not exceed seven thousand acres, together with the water demanded for domestic use, and aver that it is of sufficient capacity to supply nine thousand acres, together with domestic uses of a population of twenty thousand persons.

42 And they deny that at the rate of \$3.50 per acre, if water should be demanded and used upon the whole of the lands which the system is able to supply with water, and rates are allowed in said National City equally high for domestic uses and irrigation, said company would not be able to pay its operating expenses and maintain from such rentals its plant and system. They deny that said company has been or still is under said established rates losing money every or any year. They deny that its said plant and system has been or is gradually going to decay from natural depreciation consequent upon its use in supplying consumers with water without any or sufficient resources or means provided from said rates for replacing the same. They deny that said company, if said rate of \$3.50 per acre is maintained, will be compelled to furnish water to consumers at any actual or continuous loss; and they deny that if the rentals derived from said system at the rates actually established and collected, including said rate of \$3.50 per acre, are fairly applied to manage, operate, and maintain the same that said system will be lost.

And these defendants deny and each of them denies that in order to pay the said company the amount of its annual expenses and an annual income of six per cent. upon the present cost and present value of its said water system it is necessary that the rates for water sold and consumed be so fixed as to realize to said company, when its system is wholly employed, the sum of \$119,791.66 or any less sum in excess of \$32,000.00 per annum.



And defendants aver that neither the present cost nor the present cash value of the whole of said property constituting said water system exceeds the sum of \$300,000.00, and that not over one-half of the capacity of said system was on January 1st, 1896, in use, and that not over two-thirds of the capacity of said system is now in use.

And defendants deny that in order to pay the cost of operating the plant of said company and maintaining the same and  
43 pay said company as much as six per cent. net annual revenue upon the present cost and cash value of its said plant and water system it is or will be necessary to charge a rate per acre per annum of not less than \$7.00 for irrigation purposes or any sum in excess of \$3.50 per acre per annum for irrigation purposes in connection with the rate for water for domestic use under said system actually established and collected.

They deny that \$7.00 per acre per annum or any sum in excess of \$3.50 per acre per annum is a reasonable rate for these defendants as consumers to pay. They aver that each of them is owner of a right and easement in freehold of the flow and use of water through the water system of said company as in the bill of complaint alleged, and that the same is appurtenant to their respective lands, and that their lands fall within the first class established by said corporation, and that from them said company is not entitled to any interest on its investment in said plant, and they aver that the sum of \$3.50 per acre per annum for the use and enjoyment of said easement and maintaining and operating of said system has been actually established, as aforesaid, and is the only rate which has been collected by said corporation for the nine years last past from these defendants and their privies in the title to their said lands, and that no other rate has ever been actually established in respect of their lands or at any time collected, and that said rate is the ample and sufficient contribution of said lands for the maintenance of said works.

And these defendants aver that they and each of them respectively and their predecessors in estate, owners of the said several tracts of land now held and owned by the said defendants, have for more than five years prior to the first day of January, 1896, continuously held and enjoyed the use of the said waters upon their  
said lands for irrigation purposes, paying therefor the annual  
44 sum of \$3.50 per acre, and that such use and enjoyment has been open, notorious, continuous, adverse, and uninterrupted, and that they have thereby acquired the right to have and enjoy said water for the purpose of irrigating their said lands, paying therefor the said annual sum per acre, and that said right has become vested in them by such use under the said deeds of conveyance and representations and assurances, as aforesaid, and by the operation of section 318 of the Code of Civil Procedure of the State of California, and that they are entitled to have and use the said water from the said works, paying therefor the said sum per acre per annum and no more.

And these defendants aver that the said corporation is barred from having or maintaining any action at law or in equity to change



the character of or add to the burden of said easement or to increase the said annual payment for the use of the said water, and is estopped to assert, claim, or exercise any right to change the said annual payment.

And the said defendants admit that by the laws of the State of California the board of supervisors may, upon the petition of twenty-five inhabitants and tax-payers of the county, fix the rates of the yearly rental to be collected by any company furnishing water to consumers when the same is furnished as a public use, and that no such petition has ever been presented or rates fixed in the case of said land & town company.

That admit that said land & town company gave notice to the defendants that on January 1st, 1896, it would undertake to establish a rental of \$7.00 per acre per annum for water supplied to their and each of their lands for irrigation, and that from and after said date it would undertake to require them and each of them to pay said sum for the irrigation of their and each of their lands, and they admit that complainant, after his alleged appointment as receiver and before said date, gave a similar notice.

And these defendants each say that at the date of said notices they were and for a long time prior thereto had been in the  
 45 continued enjoyment of their said water rights and easements and the flow of the water thereunder, and were paying and always had paid to said company \$3.50 per annum for each acre irrigated by them and each of them.

And they say that said notice contained the further demand, as a condition to the refraining by said company from interfering with and shutting off the water supply of each of these defendants under their respective easements and water rights aforesaid, that the defendants each subscribe and execute an instrument upon a certain printed form designated "Application for water," which contained the following words and figures:

"NATIONAL CITY, CAL., — —, 1896.

"To the San Diego Land & Town Company:

"The undersigned hereby applies for a permit to connect service pipes with the mains of the company and for water service under the rules and regulations of the San Diego Land & Town Company, which are expressly made the basis for the application, and which he agrees to observe for the following purposes and at the following rates for the year ending June 30th, 1896:

"No.	Monthly rate.	Annual rate.	Total.	Date.
"	Family of four persons.			
"	Additional persons.			
"	Bath.			
"	Water-closet.			
"	Horses.			
"	Horses.			
"	Carriages.			
"	Cows.			
"	"			

" Lot and block property.

" Lots.

" "

" "

" Irrigated land.

46 " Acres.

" "

" Acres.

" Interest charges.

" Total annual rate for the year ending June 30, —, which I agree to pay, quarterly in advance, at the office of the San Diego Land & Town Company.

" The water to be furnished under this application to be used on the following land or property :

" Lot. In block.  $\frac{1}{2}$  sec.

" National City.

" National ranch.

" Ex-Mission.

" More fully described as follows :

" The location of the *top* is on — side of — avenue,  
street,

between — and — avenues.

" This contract shall remain in force until the first day of next July, when it may be terminated at the request of either party, notice to be served in writing; but in case no such request is made, then the same shall continue in force for one year, thereafter, and so on from year to year until such request is made; which request, when made, shall be to terminate this contract on the following July first.

" Provided, that if the water is furnished under this application after June 30th, 1896, the same shall be paid for at the rate fixed by the proper authorities, or the rules of the company, for the year the same is furnished, and subject to the rules and regulations of the company, the same to be payable quarterly, unless otherwise provided by said rules and regulations.

" Applicant : — —.

" SAN DIEGO LAND & TOWN CO.,

" By — —."

47 And these defendants admit that each of them has refused to pay said rate of \$7.00 per acre, and that they do maintain that neither the said land & town company nor the complainant has any legal or equitable right to increase the amount to be paid by any of them, and that the rate of \$3.50 per acre per annum actually established by the said land & town company by said contracts and conveyances, use, and practice, and which rate has at all times since the inauguration of said water system been collected and paid for the use of said water, must be and remain, and of right ought to be and remain, the established rate to be paid by these

defendants for such use as against the said attempt of said company and the complainant to raise the same to \$7.00 per acre per annum.

And defendants, further answering, allege that by the constitution of the State of California, adopted in 1879, it is provided in article XIV, section 1, among other things, as follows, to wit :

"The use of all water now appropriated, or that may hereafter be appropriated, for sale, rental or distribution, is hereby declared to be a public use, and subject to the regulation and control of the State, in the manner to be prescribed by law."

"SECTION 2. The right to collect rates or compensation for the use of water supplied to any county, city and county, or town, or the inhabitants thereof, is a franchise, and cannot be exercised except by authority of and in the manner prescribed by law."

And these defendants further aver that the legislature of the State of California, acting under and in pursuance of the said constitutional provisions, did, at its session held in 1885, pass an act entitled "An act to regulate and control the sale, rental, and distribution of appropriated water in this State other than in the city, city and county, or town therein, and to secure the rights of way

48 for the conveyance of such water to the places of use," which said act was duly approved by the governor of the State of California on the 12th day of March, 1885, and by the said act it was provided that all water now appropriated or that might thereafter be appropriated for irrigation, sale, rental, or distribution is a public use, and the right to collect rates or compensation for uses of such water is a franchise, and, except when so furnished by any city, city and county, or town or the inhabitants thereof, should be regulated and controlled, in the counties of this State, by the several boards of supervisors thereof in the manner prescribed in the said act, and it was, among other things, provided in the fifth section of said act that in the regulation and control of such water rates for each of such persons, companies, associations, and corporations the said board of supervisors might establish different rates at which water might and should be sold, rented, or distributed, as the case might be, and that said rates, when so fixed by such board, should be binding and conclusive for not less than one year next after their establishment and until established anew or abrogated by such board of supervisors, as thereafter provided; and it was further provided in the same section that until such rates should be so established or after they should have been abrogated by such board of supervisors, as in the said act provided, the actual rates established and collected by each of the persons, companies, associations, and corporations then furnishing or that should thereafter appropriate waters for sale, rental, or distribution to the inhabitants of any of the counties of this State should be deemed and accepted as the legally established rates thereof.

And they aver that said rate of \$3.50 per acre per annum established by said corporation, as set forth in the bill of complaint herein, is the only actual rate for irrigation which has ever been established and collected by said corporation or said receiver, and

49 they aver that the same is the only rate which ever has been legally established or which is to be deemed or accepted as having been legally established by said corporation therefor.

And these defendants deny that any increase of the rate for such rentals is at all necessary to enable said corporation or its receiver to maintain and operate said plant and pay the proper expenses of such maintenance and operation thereof.

They admit that in order to enforce the payment of said proposed rental of \$7.00 per acre per annum said complainant caused the water to be shut off from the premises of each of the said defendants until such demanded rentals should be paid, and they each deny that they or any of them threatened to commence suits in the superior court of the county of San Diego to compel complainant to turn on and furnish the water to their said lands or for damages.

They admit that their rights are the same to the extent that all are freehold easements, as aforesaid, and that the determination of the question of the right of said land & town company and of complainant to increase the rate of rental to be charged and collected will affect all of these defendants in the same way and to the same extent, except that the quantity of land owned by the several defendants is different.

And these defendants deny that all the questions involved in adjusting the rights of the parties in interest as involved in the controversies in this action can be better settled in one action.

They admit that the proposed increase in rates, if collected from all the lands irrigated under said system, including all those of defendants and all others, including those of the corporation itself, would add to the rentals collected by said company from all the said lands now under irrigation not less than \$14,000.00 per annum.

50 But the defendants each say, relating to the jurisdiction of this court of the said action against each defendant severally, that on and for a long time prior to January 1st, 1896, there was in force a rule adopted by the San Diego Land & Town Company, which was also adopted by said complainant as its receiver, as follows:

"1. All rates are payable at the company's office, and in all cases, except where the supply is taken through a meter or counter, will be collected in advance and within — (15) days of becoming due, as follows: For miscellaneous and domestic purposes, January, July, and October 1st, in quarterly payments.

"6. In case of non payment of the water rate within fifteen (15) days after becoming due the supply will be discontinued and will not be again renewed until full and satisfactory settlement of all arrearages shall be made, together with the sum of one dollar for turning on and off."

That under said rule, on January 4th, 1896, being the time of the filing of the bill of complaint herein, the demand of complainant for increase of rentals "to enforce payment" of which complainant caused the water to be shut off from the premises of each of these defendants until such demanded increase of rentals should be paid, as set forth and stated in the bill of complaint, was for the quarter

year beginning with January 1st, 1896, and no longer; that no rental or compensation of any kind had accrued or become due or payable to complainant at the filing of the bill herein except for the first quarter of said year.

That such demanded increase of rental for any quarter of the year beginning January 1st, 1896, would, in case of no defendant or defendants associated as partners, be as much as \$2,000.00, but in each case very much less than that sum, and in case of the defendant having the largest number of acres of land irrigated under said system would not equal \$58.00, and in case of no other as much as \$35.00, and of most others not to exceed \$3.75 each.

And these defendants, further answering, say that they  
51 have no information, except as derived from the complainant's bill, from the solemn admission of said corporation, and from the records of the recorder's office of the county of San Diego, State of California, as to whether said corporation did borrow \$300,000.00 and as to whether it is compelled to pay thereon \$21,000.00 interest annually, or what portion of the said principal sum it applied to the acquisition and construction of its water system, and they deny that it is material for them to further answer any allegation with respect thereto.

And these defendants, further answering, say that they each have at all times since January 1, 1896, paid the rate or rental of \$3.50 per acre per annum to the complainant, as such receiver, and are willing and offer to pay the same as long as it continues to be legally established.

And, further answering, these defendants say that the statute of the State of California of 1885 referred to in the bill of complaint and in this answer of these defendants, in so far as it purports to prohibit the said company from selling, disposing of, or alienating servitudes in freehold upon its said water system or its said property used or useful to the appropriation or furnishing of water, or to prohibit said company from contracting respecting the same, or from receiving full payment, satisfaction, or compensation therefor from any consumer willing to contract, purchase, and pay for the same, and in so far as said statute prescribes that such servitudes shall be enjoyed by the owner of the land to which the same are annexed as easements only upon the terms and conditions that such owners render net annual receipts and profits upon the value thereof in perpetuity, and in so far as said statute purports to prohibit said company and the consumers of water under it from the making of contracts by and between said company and water consumers respecting the annual receipts, profits, and income of any of  
52 said property, or to extinguish and satisfy and make acquittance of any right of said company to such net annual receipts, profits, and income, and in so far as such statute prohibits any of the contracts in this answer set forth relating to the sale, transfer, or vesting of the flow and use of water in freehold annexed to the lands of the respective defendants herein, and in so far as it prohibits the sale, transfer, and vesting of the ownership of the water rights in the bill of complaint referred to in these defendants

respectively and from becoming annexed to their respective parcels of land, the same is unconstitutional and void as being in conflict with the XIV amendment of the Constitution of the United States, in that such statute would deprive said company and these defendants of their liberty without due process of law and would deny to them and each of them the equal protection of the laws, and as being in conflict with the declaration of rights contained in section one of the constitution of the State of California, and which said section is in words and figures following to wit:

*"Article 1, Declaration of Rights—Inalienable Rights.*

"SECTION 1. All men are by nature free and independent, and have certain inalienable rights, among which are those of enjoying and defending life, liberty and property, acquiring, possessing and protecting property, and pursuing and obtaining safety and happiness."

And as being in conflict with article twenty, section nine, of the constitution of the State of California, which is as follows:

"SECTION 9. No perpetuities shall be allowed, except for eleemosynary purposes."

And each defendant for himself says that his liability to pay rentals or charges of any kind for the service of said system is several and not joint, except only in the case of said defendants associated as partners, which is joint only as between such partners.

And the defendants say that the following defendants, among others, are not inhabitants or residents of the State of California and are not competent to make petition to the board of supervisors, as provided in section 3 of said act of 1885, to wit:

T. M. Eaton, Charles Mohnike, the heirs of Schulenburg, deceased; E. J. Elliott, H. E. Klammer, D. S. McBean, Edwin S. Belcher, J. W. Stearns, N. J. Pillsbury, Mary D. Klammer, Arthur Ryan and Michael Mack, L. V. Wright.

And they say that the following-named defendants are public-school corporations and not tax-payers of any county of this State:

Chula Vista School District, Sunnyside School District, Sweetwater School District, and for said reasons are not competent to make such petition.

And the following-named defendants, among others, are not inhabitants of said county of San Diego, to wit: Edward Gulick, William Gulick, and J. O. Rhinehart, and for said reasons are not competent to make such petition.

And said defendants, so being incompetent to petition the board of supervisors, as provided by section 3 of said act of 1885, say and all the defendants say that they have no power to compel any sufficient number of competent inhabitants who are tax-payers to join in a petition to the board of supervisors, as provided in said section 3 of said act.

And these defendants say that said statute of the State of California approved March 3rd, 1885, in so far as it assumes or purports

to authorize or empower said San Diego Land & Town Company or said receiver to increase, as is alleged in the bill of complaint, said rate of \$3.50 per acre per annum heretofore actually established and collected from the defendants without the consent of the defendants and each of them, is in violation of section one of article XIV of the amendments of the Constitution of the United States, and deprives each of them of his and her property without due process of law and denies to each of them the equal protection of the law.

54 And these defendants further say that, in so far as said statute of 1885 purports to authorize or empower said land & town company or its receiver to shut off or to justify them or either of them in their act, as set forth in the bill of complaint, in shutting off the water from the lands of these defendants or either of them, or to deprive these defendants or either of them of the enjoyment of their said water rights and of their said easement of the flow and use of such water for the irrigation of their said respective tracts of land as a means of enforcing against these defendants the collection of the increase of rental demanded in the bill of complaint or any increase made without consent of these defendants of the said rate of \$3.50 per acre per annum heretofore actually established and collected from these defendants, and in so far as said statute purports to permit or authorize such enforced collection without permitting these defendants to have any standing in this court to contest the reasonableness of said increase of rates, and in so far as it purports to empower this court or any court to enjoin these defendants or any of them from contesting the reasonableness of said increase of rates in any court, the same is unconstitutional and void as tending to deprive and depriving these defendants and each of them of their property without due process of law and as tending to deprive and depriving them and each of them of the equal protection of the laws, in violation of section one of the XIV amendment of the Constitution of the United States.

And these defendants humbly submit and insist that the rate of rental for irrigation of each of their said parcels of land ought not to be changed or altered from the rate of \$3.50 per acre per annum, being the rate and rent actually established and collected by said San Diego Land & Town Company and said receiver, as aforesaid.

And, further answering, these defendants admit that the complainant, C. D. Lanning, was appointed receiver of all the  
55 property of the said San Diego Land & Town Company of Kansas by the circuit court of the United States for the district of Massachusetts at the time and with the powers as in the bill of complaint alleged, and that said receiver took possession of said property and of the management thereof as such receiver.

And these defendants aver and each of them avers that the acts of said receiver, as set forth in the bill of complaint, in undertaking to raise the said rate of \$3.50 per acre per annum for irrigation to \$7.00, and in shutting off the water supply, as in the bill of complaint alleged, are and each of them is in violation of article V of the amendments to the Constitution of the United States, as acts



done under a color of authority of the United States, tending to deprive and depriving these defendants and each of them of their property without due process of law.

And these defendants, as matter of supplement to their said answer, state that the legislature of the State of California, at the session thereof held in 1897, passed an act entitled "An act to amend an act entitled 'An act to regulate and control the sale, rental, and distribution of appropriated water in this State other than in any city, city and county, or town therein, and to secure the rights of way for the conveyance of such water to the place of use,' approved March 12th, 1885, by inserting a new section therein relating to contracts for the sale, rental, and distribution of water, and the sale or rental of easements and servitudes of the right to the flow and use of water," and which said act was duly approved by the governor of the State of California on the 13th day of March, 1897, and thereupon immediately went into effect.

And defendants further aver that the addition so by the said amendment made to the said act was a section numbered 11½, and which said section is in the words following, to wit:

56 "SECTION 11½. Nothing in this act contained shall be construed as prohibiting or invalidating any contract already made, or which shall be hereafter made, by or with any of the persons, companies, associations or corporations described in section two of this act, relating to the sale, rental or distribution of water or to the sale or rental of easements and servitudes of the right to the flow and use of water; nor to prohibit or interfere with the vesting of rights under any such contract."

And these defendants further aver upon information and belief that by virtue of the said provisions of the Constitution of the United States and of the State of California and under and by virtue of the act of the legislature of March 13, 1897, before mentioned, these defendants and each of them had the right to enter into the contracts with the said San Diego Land & Town Company herein set forth, and the said contracts are valid and effectual, and that the said complainant had no right to make such increased charge for the use of water as aforesaid.

And these defendants deny that any other matter or thing in the said bill of complaint contained and not herein and hereby well and sufficiently answered unto, confessed and avoided, traversed or denied, is true, to the knowledge or belief of them or either of them.

All which matters and things these defendants are ready to aver, prove, and maintain as this honorable court shall direct, and pray to be hence dismissed with their costs and charged in this behalf most wrongfully sustained.

JOHN S. CHAPMAN,  
C. H. RIPPEY, AND  
HAINES & WARD,

*Solicitors for said Defendants.*

STATE OF CALIFORNIA, }  
 County of San Diego, } ss :

D. L. Murdock, being first duly sworn, deposes and says :  
 57 That I am one of the defendants named in the foregoing-  
 entitled further answer ; that I have read said further answer  
 and know the contents thereof, and that the same is true of my own  
 knowledge, except as to the matters which are therein stated upon  
 information and belief, and as to these matters I believe it to be  
 true.

D. L. MURDOCK.

Subscribed and sworn to before me this 11th day of September,  
 A. D. 1898.

[SEAL.]

DAVID C. COLLIER,  
*Notary Public in and for the County of*  
*San Diego, State of California.*

That pursuant to the written stipulation of the parties to said  
 action, filed September 13, 1897, an order was entered by the court  
 on Dec. 20, 1897, *nunc pro tunc*, as of the 13th day of September,  
 1897, that the oath of any one of the defendants to the joint and  
 several answers of the defendants shall be treated as the oath of all,  
 and that the answers shall be treated as though sworn to by all.

That to the said answer so filed the said complainant, Chas. D.  
 Lanning, receiver of said San Diego Land & Town Company of  
 Kansas, filed, on September 22, 1897, the exceptions in words and  
 figures as follows, to wit :

(Title of Cause.)

*Exceptions Taken by said Complainant to the Answer of the said*  
*Defendants to His Bill of Complaint in This Cause.*

First. For that said defendants have not according to the best  
 of their information, knowledge, and belief set forth and discovered  
 in their answer relevant and material matters of facts showing or  
 tending to show that the matters alleged in the complainant's said  
 bill of complaint are not true or in confession and avoidance thereof,  
 but instead thereof have set forth in their said answer immat-  
 58 terial, irrelevant, and impertinent matter, and particularly  
 the following allegations contained and set forth in said an-  
 swer, to wit :

1. That part thereof commencing with the word " They," in line  
 4, page 4, of said answer, as follows :

" They deny that said corporation is or at any time was the owner  
 of any water or water rights or reservoir or any water system, as  
 alleged in the bill of complaint, except as hereinafter set forth, or  
 that it is or at any time was the owner of any water or water rights  
 or reservoir or any water system for or devoted to any purpose ex-  
 cept as hereinafter set forth."

2. That part thereof commencing with the word " And," in line  
 15, page 4, of said answer, as follows :

"And they say that said dam and reservoir are entirely on land constituting part of the bed of the Sweetwater river and on riparian land on both sides of said river contiguous thereto."

3. That part thereof commencing with the word "That," in line 19, page 4, of said answer, as follows:

"That said corporation became the owner in fee-simple of the ground occupied by its dam, reservoir, pipe lines, and conduits and all the real estate occupied by its water system by private grants to it from the owners thereof holding by mesne conveyances from the owners of the Mexican grants in said San Diego county, known as the Rancho de la Nacion and the Jamacha rancho; that it acquired the title to all the said land occupied by its reservoir prior to 1886 except a tract of three hundred and fifty-five acres in the extreme upper end of the reservoir, which it acquired in 1891 by grant to it from George H. Neale and wife, the then owners.

"That said Rancho de la Nacion contains 26,631.94 acres of land and has its western boundary on San Diego bay, a navigable water of the Pacific ocean, from whence it extends eastward about seven miles, and that the patent for said rancho was duly issued by the United States Government on February 27, 1866.

59 "That said Jamacha rancho adjoins said Rancho de la Nacion on the east and contains two square leagues of land; that the said grant was duly confirmed by the district court of the United States for California on March 9, 1858, and that the United States duly issued a patent conformably thereto.

"That the said Sweetwater river flows westerly through said Jamacha rancho, and, pursuing the said course, passes from it into said Rancho de la Nacion, and, flowing nearly through the center of said last-named rancho for about seven miles, has its mouth therein, where it empties into San Diego bay at the western boundary of said last-named rancho.

"That on the 9th day of June, 1869, Frank A. Kimball and Warren C. Kimball were, and for a long time prior thereto had been, the owners in fee of said National rancho and of all and singular the bed of the said Sweetwater river and of all the land on each side thereof and contiguous thereto in said Rancho de la Nacion from the eastern boundary thereof, being also the western boundary of said Jamacha rancho, downward, along and upon the said Sweetwater river to the place where it empties into the bay of San Diego.

"That afterwards, as early as the year 1881, said company acquired the title in fee of all the waters then flowing and thereafter to flow in said Sweetwater river in and through said Rancho de la Nacion, with the right to divert the same from its natural channel at any point or points in said rancho, by a regular chain of mesne grants and conveyances under a grant and conveyance of the same made by said Frank A. Kimball and Warren C. Kimball on said 9th day of June, 1869.

"That by reason of the premises the said company became the owner in fee-simple of all the water in and riparian rights on the said Sweetwater river and of the bed of said river from the highest

flowage point of its reservoir in said Jamacha rancho down to said San Diego bay, and that it acquired such ownership prior to the year 1886, except as to that portion thereof at the extreme upper end of said reservoir acquired from said Neale and wife in 1891, as aforesaid."

4. That part thereof commencing with the word "That," in line 5, page 6, of said answer, as follows:

"That pursuant to the provisions of title VIII of the Civil Code of California said company caused to be posted and recorded in Book One (1) of the Record of Water Claims for San Diego County notices each respectively of the appropriation of 5,000 inches of water of said Sweetwater river at the location of said dam; one of said notices in the month of September, 1886, recorded at page 171; one in the month of September, 1887, recorded at page 178; one in the month of April, 1887, recorded at page 248; all in said Book One (1).

"That each of said notices contained in the designation of the purposes for which the said water was claimed for the words following, to wit:

"The purposes for which said undersigned claims said water are to supply for culinary and irrigation purposes, the watering of live stock, and other domestic uses to the lands north and south of the Sweetwater river and adjacent thereto.

"That in the month of August, 1888, said company in its own name posted and filed for record a notice of appropriation of 75,000 inches of continuous flow of said Sweetwater river for the purposes set forth in said notice in words following, to wit:

"The purposes for which said water is claimed is to divert and distribute the same through pipes, flumes, ditches for the purpose of irrigation, domestic, manufacturing, and such other uses and purposes as may be practicable and expedient.

"But defendants aver that at the time of the filing and recording of each of said notices of appropriation and of the commencement of the construction of said irrigation system the riparian land on said Sweetwater river and tributaries and the beds thereof above

61 said reservoir were substantially all in private ownership, and almost none of said riparian land or beds of the streams were public lands of the State of California or the United States."

5. That part thereof commencing with the word "That," in line 10, page 7, of said answer as follows:

"That the location of said dam is across the channel of said Sweetwater river at a point within the boundaries of said Rancho de la Nacion about one-fourth of a mile west from the eastern boundary thereof, and is so located that the whole reservoir capable of being filled by the same is on lands so acquired by said company in said Rancho de la Nacion and Jamacha rancho.

"That the capacity of said reservoir is six thousand million gallons, and that the water system of said company covers and can supply about 9,000 acres of the 12,000 acres of territory thereunder, consisting of certain farming lands within and outside of said National City; and, in addition to supplying said 9,000 acres, can supply the domestic uses and needs of a population, when settled

upon said lands within and without said National City and on village property within said city, of 20,000 persons."

6. That part thereof commencing with the word "And," in line 29, page 7, of said answer as follows:

"And they deny that it is material or relevant that they should answer as to what sums of money were expended for such purposes."

7. That part thereof commencing with the word "Defendants," in line 8, page 8, of said answer as follows:

"Defendants each, except the defendants C. H. Rippey and M. L. Ward, admit that they are each the owners of tracts of land under the said water system of said land & town company, and that most of these defendants own and hold small tracts of only a few acres each, and they say that none of them own to exceed twenty-five acres irrigated from said system, except Warren C. Kim-

62 ball, who owns about seventy acres, and that each of said defendants owns his and her tract in severalty, except as follows: The defendants Edward Gulick, William Gulick, and Henry Gulick own twenty acres of land as tenants in common, the defendants J. M. Howe and H. O. Howe own twenty acres of land as tenants in common, the defendants Arthur Ryan and Michael Mack own ten acres as tenants in common, and the defendants F. E. Leslie and H. P. Whitner own ten acres as tenants in common."

8. That part thereof commencing with the word "And," in line 1, page 9, of said answer as follows:

"And that each such water right and easement is in freehold and is a freehold-servitude imposed upon said water system for the benefit of the land to which it is appurtenant, and that all claims and demands of said company for the price or compensation therefor has been paid or otherwise satisfied by purchase or otherwise, as in the bill of complaint alleged."

9. That part thereof commencing with the word "Under," in line 13, page 9, of said answer as follows:

"Under the facts hereinafter set forth."

10. That part thereof commencing with the word "And," in line 18, page 9, of said answer as follows:

"And these defendants say that, of the said 12,000 acres of farming and orchard lands lying under said reservoir and within the reach of water supply therefrom, the said corporation, in January, 1887, owned, and for a long time prior, to wit, since the year 1869, had owned and held, for the purpose of sale, use, and profit, about seven thousand acres.

"And, further answering, these defendants say that the lands of said corporation owned by it in January, 1887, as hereinbefore stated, irrigable from its said reservoir and distributing system, as so constructed, are situate in the Sweetwater valley, in Chula Vista, and in National City, all within the boundaries of National ranch, 63 in said city of San Diego; also in Otay valley, in said county, adjoining said National ranch on the south, and in the territory known as ex-Mission lands, adjoined to National City on the north, and that said lands, together with the said town lots owned

by said company as aforesaid, form virtually one continuous tract extending from near the base of the said Sweetwater reservoir westward to the bay of San Diego and from the Otay valley on the south to the municipal boundaries of the city of San Diego on the north and west thereof.

"That the lands, as owned in January, 1887, by others than the said company are in detached parcels scattered among said lands of the said company.

"And they say that said lands of said corporation were in January, 1887, entirely unsettled and in their wild and natural state, and were almost entirely arid and of but little value without water for irrigation.

"That the said lands belonging to others than said company were also at said date largely unsettled and in their wild and natural state, and were of the same general character with those of said company.

"And these defendants say that the said San Diego Land & Town Company acquired its said water, water rights, reservoir site, reservoir and distributing system for the purpose of devoting the same, first, to irrigate its own lands aforesaid and to supply the needs of inhabitants of said land who should be induced to purchase said lands from it as lands under irrigation and to settle on said lands.

"And that the object of said company in acquiring and constructing said water system was to enable it to sell its said lands as irrigated lands, with the easements of the perpetual flow and use of the water necessary and useful to irrigate the same, and to supply all the beneficial uses of the people who should settle upon them, annexed as appurtenants in freehold thereto, and to create the freehold servitudes upon its said water system corresponding to such easements.

64 "And defendants aver that said water, water rights, and said water system, to the extent necessary and useful for the irrigation of the lands of said company, became a part of said land and became merged in the estate of said company in said realty as one estate.

"And they say that, subject to the foregoing purposes, the said San Diego Land & Town Company devoted and appropriated the remainder of its said water, water rights, and the capacity and service of its reservoir and whole water system to the sale, rental, and distribution of the use of water to the public.

"And these defendants say that said land & town company, in part execution of its said and first primary purpose, object, and project for selling its own lands, laid out and platted its tract of lands known as Chula Vista, which consisted of about five thousand acres, in blocks of forty acres each, and bounded each such block by avenues and streets, and subdivided said blocks into lots of five acres each, and laid pipes through seven avenues therein, each about three miles in length and separated from each other one-fourth of a mile, and also pipes said Chula Vista at right angles with said avenues at the distance of every mile in the street crossing said avenue, and by said means said company's distributing system was



made sufficient to reach and serve with water each five-acre lot on said Chula Vista tract.

"And also reach its farming lands lying within the said city of National City, and extended pipes from its said system through said National City to serve and irrigate 390 acres of said ex-Mission lands outside and to the northward of the same, and that, in still further execution of said project, the said company laid pipes in the Sweetwater valley and elsewhere in National ranch, in the Otay valley, and in the tract known as ex-Mission, to reach and within reach of its said lands there situated.

65 "And, further answering, these defendants say that nine-tenths of the said company's distributing-pipe system aforesaid, when laid and ready for operation in February, 1886, was so laid in anticipation of future use and demand for water supply and not for any use or demand then existing, and that when laid it was, and to a great extent still is, ahead of the demands therefor, and that much thereof has laid unused."

11. That part thereof commencing with the word "And," in line 5, page 12, of said answer as follows:

"And, further answering, the defendants say that from the time when said corporation entered upon the enterprise of constructing said water system it has at all times advertised in print and in writing subscribed by it and held its said farming and orchard lands for sale, and up to January 1st, 1896, did, as an inducement to the purchase thereof, both privately and publicly and continuously, in writing subscribed by it and otherwise, represent that the water of its said system was piped to and over said lands and lots and was and would be supplied to purchasers thereof in abundance for irrigating the same at the rate of \$3.50 per acre per annum for farming and orchard lands."

12. That part thereof commencing with the word "And," in line 16, page 12, of said answer as follows:

"And, further answering, these defendants say that the said corporation since the early portion of the year 1887 and up to January 1st, 1896, had at all times kept its said lands continuously on the market for sale, with and under said representations as to water supply thereof and as to the annual rate for the same for irrigation."

13. That part thereof commencing with the word "And," in line 22, page 12, of said answer as follows:

66 "And, further answering, these defendants say that the lands of said corporation situated in the Sweetwater valley, in the Otay valley, and in the ex-Mission, consisting of about 5,700 acres, without the appurtenant water supply under said system, have at no time been worth more, in case purchasers could be found, than an average of \$35.00 per acre, and that its lands in Chula Vista, comprising about 5,000 acres, as aforesaid, as so laid out and platted, without the appurtenant water supply under said system, have at no time been worth more, in case purchasers could be found, but rather less, than an average of \$75.00 per acre, and that its lands other than town lots situated within said city of National City, comprising about 900 acres, without the appurtenant



water supply under said system, have at no time, in case purchasers could be found, been worth more, but rather less, than an average of \$100.00 per acre.

"That by reason of said appurtenant water supply the said corporation regarded and treated the value of said lands and lots as proportionately enhanced, and that accordingly it has at all times since early in the year 1887 held its raw lands, including the annexed perpetual easement water supply from its said water system, in said Sweetwater valley, in said Otay valley, and in said ex-Mission, at an average of \$250.00 per acre, and has at all times held its raw lands in Chula Vista, with the said annexed water supply, at prices ranging from \$300.00 to \$500.00 per acre, except that it offered and sold about six five-acre tracts of its Chula Vista lands at \$150.00 per acre as an inducement to the first few purchasers to locate thereon, and has at all times held its lands within said city of National City, together with the water supply annexed, at \$350.00 to \$500.00 per acre, and has held its lands, where improved by it with the aid of said appurtenant water supply, outside of the value of improvements, on the same basis of valuation for the land and water."

14. That part thereof commencing with the word "And," in line 21, page 13, of said answer as follows:

"And these defendants, further answering, say that, at said prices and under said representations that the annual rate for water for irrigation was and would be \$3.50 per acre, said corporation  
67 had, up to the date of the filing of the bill of complaint herein, sold to certain of the defendants and their predecessors in title severally parcels of said irrigated lands outside of National City aggregating about twelve hundred acres, with the freehold easement of water supply annexed as an incident and appurtenant to the land granted, and that in cases of the purchase of each such parcel of land each purchaser thereof respectively relied upon the said representations of said corporation that the annual rate for water to be supplied for irrigation was and would remain not higher than \$3.50 per acre, and that in each case of such parcel of land so sold said corporation, prior to making its conveyance of the same to purchasers, connected said lands with the actual flow of water from said system, both for irrigation and domestic and other uses for persons and animals thereon, and, in respect of lands in said Chula Vista so sold by said corporation, that it exacted from and imposed upon each of said purchasers of a tract from it his obligation to erect a residence house thereon at once to cost not less than \$2,000.00."

15. That part thereof commencing with the word "And," in line 10, page 14, of said answer as follows:

"And these defendants, further answering, say that up to December, 1892, said corporation made no express or separate grant of 'water rights' as appurtenant to such of said land up to that time so sold by it to certain of these defendants, but granted the easement of the flow and use of water from its said system as an appurtenant to the land sold and granted with such land after it had

been connected with the said water system and after the said flow and supply of water had been applied to irrigate the land so sold and to the uses of persons living and animals kept thereon, and contracted for and received compensation for the land and appurtenant water right in a single price for both.

68 "That after December, 1892, said corporation, in all cases where it sold of its said lands, did, by an express contract in writing, specifically sell to those of the defendants who purchased lands from it after that date the appurtenant water right, and that each of such contracts contained the following provisions (the description of the land and the price for the same, with the water, being adapted to each case), to wit:

"That in consideration of the stipulation herein contained, and the payment to be made, as hereinafter specified, the party of the first part, (said corporation) hereby agrees to sell unto the party of the second part, and the party of the second part agrees to purchase of the party of the first part, the following real estate, to wit:" (Description) "Together with a water right to the one-acre foot of water per annum for each and every acre of said above-described real estate, to be delivered by the party of the first part through its pipes and flumes at a point — said water to be used exclusively on said real estate, to become and be appurtenant thereto, and not to be diverted therefrom. Provided, that the party of the first part may change the place of delivery of said water, so long as the same is near the highest point of land. For which land and water right the party of the second part agrees to pay the sum of — dollars.

"And the party of the second part further agrees and binds —self — heirs, executors and assigns, to pay the regular annual water rates allowed by law and charged by the party of the first part for the water covered by said water rights, whether said water is used or not, and to pay for all water used on said land for domestic purposes, monthly, under such rules and regulations for the delivery of water to consumers as the party of the first part may from time to time make.

"And these defendants say that in the character and quality of the appurtenant water rights connected with the land sold by said corporation, as aforesaid, no discrimination exists or has at  
69 any time been claimed by said corporation or has at any time been recognized by said purchasers between the lands so sold by it after the inauguration of said water system up to December, 1892, and those sold by it after that date with the express and specific provisions as hereinbefore set forth."

16. That part thereof commencing with the word "And," in line 28, page 15, of said answer as follows:

"And these defendants, further answering, say that the title to the lands of certain of them, to the aggregate of about nine hundred acres, lying outside of said National City, was not derived from said corporation; and in respect of such lands they say that said corporation furnished water for the irrigation of so many of such land as came into cultivation up to December, 1892, without exacting a price for a water right, but voluntarily annexed the perpetual ease-

ment of the flow and use of water from said system to said lands, and voluntarily, in all respects, has from the beginning of its water service treated and still does treat the same as to water rights in all respects on the same footing as the lands sold by it to other of these defendants or their predecessors in interest, as hereinbefore alleged, and that from the beginning of its water service, in 1887, until now the annual water rates actually established and collected by said corporation for water furnished by it to land not sold by it have been the same as for water supplied to lands sold by it."

17. That part thereof commencing with the word "And," in line 14, page 16, of said answer as follows:

"And defendants, further answering, say that from and after said date of December, 1892, said corporation refused to furnish water to irrigate other or further lands under said system not owned or sold by it except upon the payment of a sum in gross for the water right over and above the uniform annual rate as actually established and collected from all lands under the system, or, in line thereof, 70 of six per cent. annual interest upon its estimate of the value of such right.

"That it first fixed the price of such water rights at \$50.00 per acre, and later raised the same to \$100.00 per acre, and that after the same date of December, 1892, it furnished no water to irrigate any lands not sold by it except upon payment of the price fixed by it for a water right under a contract for the sale of such water right containing the following provisions (the filling of the blanks being adapted to each case), to wit:

"That the party of the first part (said corporation) agrees to and does hereby sell, to the party of the second part a water right to one acre foot of water per acre per annum, for each and every acre of the real estate hereinafter described, to be delivered through the pipes and flumes of the party of the first part for the sum of — dollars, payable as follows: —; provided the party of the first part, may, at its option, change the place of delivery of said water, so long as the same is near the highest point on the lands for which the water is delivered under and in accordance with the rules and regulations established from time to time by the party of the first part. Said water right is sold for the use of and to be appurtenant to the following-described real estate now owned by the party of the second part, in the county of San Diego, State of California, to wit: —, consisting of — acres.

"And it is expressly understood and agreed that the water right hereby sold shall belong to said described real estate and be used thereon, and not diverted therefrom or used on any other lands.

"In consideration of the foregoing stipulations and agreements, the party of the second part agrees and binds —self, — heirs, executors and assigns, to pay the sums above specified promptly as the sums, and each of them falls due, and that — will in all things comply with and perform the terms and conditions of this agreement on — part to be performed, and that — and they will promptly pay all annual water rates and charges for the water to which — is entitled under and by virtue of this

agreement at rates fixed by the party of the first part as allowed by law, and at the times, in the manner, and according to the rules and regulations made and adopted by the party of the first part, the annual rental for the amount of water to which the party of the second part is entitled under this contract, to be paid whether the same is used or not, and also to pay for all water used by — on said land for domestic purposes at the rates fixed by the party of the first part and allowed by law.

“And that said company annexed under said form of contract the water rights referred to in the bill herein, which are appurtenant to about 400 acres of the lands of certain of these defendants.

“And that said corporation at no time has made or claimed and does not now make or claim any distinction in respect of the character and quality of the water right or of the annual rates actually established or collected for irrigation between such of the said lands not purchased from it as are furnished with water for irrigation by it, whether under such special contract for water right or without.

“And these defendants say that the defendant J. M. Ballou owns his water right, alleged in the complaint, by virtue of a special written contract with said corporation making such water right appurtenant to his land for a valuable consideration by him paid to said corporation and under the provisions as to rates in the words, to wit :

“Provided, that said party of the second part shall make application in the form provided by the company, for the use of the water, and use the same under the same restrictions and conditions, and to pay said party of the first part the current rate therefor, as established for Chula Vista; provided, said restrictions and  
72 conditions are not inconsistent with the water right hereby granted to said party of the second part.”

“And these defendants further say that of their number the owners of the lands to the amount of about 400 acres, which lie in said ex-Mission and which have annexed to them water rights, as in the complaint alleged, entered into a written contract with said corporation for the use and flow of said water to said lands, and that said contract contains the following provisions :

“The parties of the first part will make application for the use of the water upon the form provided by the party of the second part for that purpose, and pay for the use of the water at the current rates as may be enforced from time to time for supplying lands in National ranch, and subject to the same general rules and regulations.”

18. That part thereof commencing with the word “And,” in line 2 of page 19 of said answer, as follows :

“And, further answering, these defendants say that on or about June 3rd, 1895, said corporation established a classification of lands which has been or which should be provided with water by its system to take effect July 1st, 1895, and afterwards confirmed the same to take effect January 1st, 1896, and that said classification

has been adopted by the complainant receiver and is in words following, to wit:

"Tenth. For the purpose of fixing rates for irrigating acre property, the lands of that character are classified as follows:

"All lands to which the easement and flow of water for irrigation has been or shall be annexed by the consent or voluntary act of this company shall constitute the first class.

"All lands to which the easement and flow of water for irrigation has not been or shall not be annexed by the consent or voluntary act of this company shall constitute the second class."

"And in respect of said second class of lands it at the same time promulgated the following, to wit:

73 "In addition to said annual rate for water used upon lands of said second class there shall be paid upon the lands of said class an annual charge equal to six (6) per centum of the value of the right to said easement and flow of water for irrigation; which said value is to be taken as one hundred dollars (\$100.00) per acre."

"And these defendants say that the lands of each and all of the defendants fall within the first class so defined by said corporation and said receiver."

19. That part thereof commencing with the word "And," in line 28 of page 19 of said answer, as follows:

"And these defendants further say that said corporation has planted and improved other considerable tracts of its said lands still owned by it, aggregating about 1,500 acres outside of said National City and about 75 acres within said city, and has used and is using thereon water supplied from its said system as appurtenant to said land and for cultivating the same, and also holds said lands, with such appurtenant easement of water supply, for sale, and that said corporation retains the remainder of its said lands under said system—comprising about 4,000 acres, to which water has not actually been applied—at valuation not less than hereinbefore stated for raw land, with the incident and easement of water supply annexed, and has refused and at all times refuses to dispose of the same without including said water supply, except on the conditions that purchasers would pay to complainant the price for said lands so fixed by it, and to include the price of a water right or interest at six per cent. per annum on the price of such water right, at the option of the purchaser."

20. That part thereof commencing with the word "And," in line 21 of page 20 of said answer, as follows:

"And they say that in the classifications aforesaid made by said corporation and its receiver no discrimination is made or at any time has been made between lands of the first and second

74 class in respect of the annual rate, and that the said additional charge of six per cent. per annum upon the value of such water right applies only to such lands as shall receive the use and flow of water from said system for irrigation upon demand of their owners to share in that part of the said waters appropriated by said corporation to the public use in the cases where the owners

shall not have paid or secured to be paid, by contract or convention with said corporation, the gross sum demanded by it for the sale and conveyance of the water right for such lands, and they say that none of the lands of these defendants now under irrigation fall within the second class.

"And these defendants say that they have each accepted and concurred in and do accept and concur in the said classification of lands as made by said corporation and receiver, and that the same has become established, and that the same is just, equitable, and reasonable as between said corporation and all the land-owners under said system."

21. That part thereof commencing with the word "And," in line 9 of page 21 of said answer, as follows:

"And these defendants say that the aggregate number of acres of land now under irrigation from said system, including those of these defendants of said corporation and of all others, does not exceed 4,300 acres or one-half of the capacity of the reservoir and distributing capacity of the main pipe lines of said corporation after allowing for the domestic uses of 20,000 persons, and that about 800 acres of said land so irrigated lie in National City.

"And these defendants further say that neither of them know, and that neither of them has been informed, save by complainant's said bill and the statements of said corporation, what is the actual annual expense of operating and keeping in repair the said reservoir and water system of said company and furnishing its consumers with water, exclusive of the alleged interest of seven per centum of \$300,000.00 of the bonds of said corporation referred to in said bill, but that upon such information they are informed and believe, and therefore allege, that the said annual expenses do not exceed the sum of \$12,034.99, as stated in the bill of complaint herein.

"And they aver that the 'natural and necessary depreciation of its system' referred to in the bill of complaint is made good by the keeping of the same in repair, the cost of which is included in the annual charges, and they say that, as shown by the books of said corporation and its official reports, the aggregate, under the head of its accounting for 'water service,' 'maintenance of pipe lines,' 'maintenance of Sweetwater dam,' and 'expenses' for the years ending December 31st, 1890, 1891, 1892, 1893, and 1894, were respectively \$8,015.48, \$13,002.46, \$11,395.17, \$11,410.48, and \$7,850.18.

"And, answering upon such information, they allege that the amounts so actually realized from the whole system for water rentals alone, exclusive of any proceeds of the sale of water rights during said year, did not fall below \$25,715.00, and they say that at the same rates the amount that will be realized by said corporation from the annual rentals under said system, exclusive of any sums derived from the sale of water rights, will not, for the year ending January 1st, 1897, fall below \$27,000.00; and the defendants say and each of them says that the amount of \$25,715.00 was collected as water rentals for the year ending January 1st, 1896, for the several purposes for



which water was used from the said company's system, with the irrigation rate fixed at three and one-half dollars per acre per annum, and that the sum of twenty-seven thousand dollars is the measure of the yield for the year ending January 1st, 1897, from the said rentals, with the rate for irrigation fixed at the same annual rate of \$3.50 per acre, and with but two-thirds of the capacity of said system in use.

76 "And they further say that the said amounts actually realized annually from water rents under said system are derived from sums paid in respect of the lands owned by others than the said corporation and the rentals attributed to the lands owned by said corporation actually under irrigation, and that no part thereof has at any time been derived from or attributed to the lands of said corporation, whether still owned by it or heretofore sold by it, so long as the same were not or still are not actually irrigated."

22. That part thereof commencing with the word "And," in line 30, page 22, of said answer, as follows:

"And defendants further say that they are informed by the records and official reports of said corporation, and therefore aver the fact to be, that on January 31st, 1894, the net balance of its actual receipts from water rentals, based on collections actually made from lands actually irrigated, both those sold and those never owned by the company, and sums charged to lands owned by the company actually irrigated from February, 1888, to said December 31st, 1894, accumulated in its hands to the credit of said water system, after deducting the items of 'expenses,' 'maintenance of pipe line,' and 'maintenance of Sweetwater dam,' was \$49,699.28.

"But they say that said net balance to the credit of said water company's department on said December 31st, 1894, does not include any charge, rate, or assessment to the lands of said corporation which at any time were not or that now remain unirrigated."

23. That part thereof commencing with the word "But," in line 15, page 23, of said said answer, as follows:

"But these defendants, further answering, say that they deny that said corporation is entitled to demand or receive from these defendants any sums whatever by way of water rentals in behalf of or to apply upon the said demanded income of six per cent. or any net income on the alleged cost of said water system.

77 "And they deny that they or either of them own their said water rights in and under said water system, subject to any obligation, legal or equitable, other than such as arises from the actual rates established as aforesaid and collected by said company, which in case of their lands is \$3.50 per acre per annum.

"And they deny that the compensation to said corporation for either of their respective water rights, easements, or servitudes aforesaid were or are still subject to regulation by any board of supervisors of this State, as provided by said act of 1885."

24. That part thereof commencing with the word "They," in line 29, page 23, of said answer, as follows:

"They aver that such of their number as have purchased their



said lands, with water rights appurtenant thereto, from said corporation and such of their number as have purchased of said corporation water rights made appurtenant to their lands not bought of the corporation have each and all paid the full amount demanded by said corporation as the price of the perpetual easement of water supply from said company's water system by said company granted and annexed to such lands. They aver that such easements are respectively servitudes upon said company's water system and have been fully paid for, and that the owners of said lands are forever discharged and acquitted from payment of any further sum or sums to apply on the principal of or as income upon the cost or value of said water system or any debt incurred by said corporation for construction thereof or the value of their respective water rights.

"And they allege that said company, in each of said cases where water was devoted to the public use, received satisfaction for, from, and parted with to each of said defendants or to his or her predecessor in interest all right to demand and collect water rentals proportioned to said lands as corresponded or related to interest or income on the cost or value of said system or to net annual receipts and profits thereon or therefrom.

78 "And that in said respects it has at all times put all other lands to which it has voluntarily annexed said water rights upon the same footing, and that all such lands have remained on the same footing for more than five years; that said lands have in many cases changed owners while so supplied with water at the same rates and on the same footing as to water rights with the land sold by the said company with annexed water rights aforesaid; that the value of said water rights has for more than five years entered into the market value of said lands, and has in all cases been paid for to their vendors by the present owners, these defendants, who are successors in title by mesne or immediate conveyances of the lands to which during the former ownership the company voluntarily annexed said perpetual easement and water rights, and that neither any such lands nor the owners thereof are in any event liable for any other or further water rentals than are the lands the ownership of which, with said water rights, were derived from said corporation."

25. That part thereof commencing with the word "And," in line 13 of page 25 of said answer, as follows:

"And these defendants each say that said annual rate of \$3.50 per acre is the only actual rate which has ever been established, or that has ever been collected by said corporation, or which has at any time been paid or assented to by the consumers under said system from the said beginning of its water service down to the time of filing the bill of complaint herein.

"That said rate so actually established and collected has during more than nine years last past been uniform as to all the lands actually irrigated under said system, and defendants say that it has been uniform and without discrimination in respect of all the lands of these defendants at all times.

"And these defendants further say that they were induced to pur-

chase, improve, and settle upon their said respective parcels of land in reliance upon the fact that said rates of \$3.50 per acre per annum for irrigation under said system has during all said period of time been uniformly and actually established and collected by said corporation, and they aver that said irrigation rate has entered into the value of all the land of these defendants and is a material element of such value.

"They admit that no other person or corporation is or ever has been furnishing a supply of water to said defendants and other consumers, and that there is not now, nor has been, any other system of water works by which said defendants can be furnished with water."

26. That part thereof commencing with the word "And," in line 4, page 26, of said answer, as follows:

"And these defendants deny that the capacity of said water system is only sufficient to supply water to not exceed seven thousand acres, together with the domestic uses of a population of twenty thousand persons."

27. That part thereof commencing with the word "And," in line 10, page 26, of said answer, as follows:

"And they deny that at the rate of \$3.50 per acre, if water should be demanded and used upon the whole of the lands which the system is able to supply with water, and rates are allowed in said National City equally high for domestic uses and irrigation, said company would not be able to pay its operating expenses and maintain, from such rentals, its plant and system; they deny that said company has been, or still is, under said established rates, losing money every or any year; they deny that its said plant and system has been, or is, gradually going to decay from natural depreciation consequent upon its use in supplying consumers with water, without any or sufficient resources or means provided for said rates for replacing the same; they deny that said company, if said rate of

\$3.50 per acre is maintained, will be compelled to furnish water to consumers at any actual or continuous loss; and they deny that if the rentals derived from said system, at the rates actually established and collected, including said rate of \$3.50 per acre, are fairly applied to manage, operate, and maintain the same, that said system will be lost."

28. That part thereof commencing with the word "They," in line 18 of page 27 of said answer, as follows:

"They deny that \$7.00 per acre per annum, or any sum in excess of \$3.50 per acre per annum, is a reasonable rate for these defendants, as consumers, to pay; they aver that each of them is owner of a right and easement in freehold of the flow and use of water through the water system of said company, as in the bill of complaint alleged, and that the same is appurtenant to their respective lands, and that their lands fall within the first class established by said corporation; and that from them said company is not entitled to any interest on its investments in said plant; and they aver, that the sum of \$3.50 per acre per annum for the use and enjoyment of said easement and the maintaining and operating of

said system has been actually established as aforesaid, and is the only rate which has been collected by said corporation for the nine years last past from these defendants and their privies in the title to their said lands, and that no other rate has ever been actually established in respect of their lands, or at any time collected; and that said rate is the ample and sufficient contribution of said lands for the maintenance of said works."

29. That part thereof commencing with the word "And," in line 4 of page 28 of said answer, as follows:

"And these defendants aver that they and each of them, respectively, and their predecessors in estate, owners of the said several tracts of land now held and owned by the said defendants, have for more than five years prior to the first day of January, 1896, continuously held and enjoyed the use of the said waters upon their said lands for irrigation purposes, paying therefor the annual sum of \$3.50 per acre, and that such use and enjoyment has been open, notorious, continuous, adverse, and uninterrupted, and that they have thereby acquired the right to have and enjoy said water for the purpose of irrigating their said lands, paying therefor the said annual sum per acre, and that said right has become vested in them by such use under the said deeds of conveyance and representations and assurances, as aforesaid, and by the operation of section 318 of the Code of Civil Procedure of the State of California, and that they are entitled to have and use the said water from the said works, paying therefor the said sum per acre per annum, and no more."

30. That part thereof commencing with the word "And," in line 20, page 28, of said answer as follows:

"And these defendants aver that the said corporation is barred from having or maintaining any action at law or in equity to change the character of or add to the burden of said easement or to increase the said annual payment for the use of the said water, and is estopped to assert, claim, or exercise any right to change the said annual payment."

31. That part thereof commencing with the word "And," in line 15 of page 29 of said answer, as follows:

"And they say that said notice contained the further demand, as a condition to the refraining by said company from interfering with and shutting off the water supply of each of these defendants under their respective easements and water rights aforesaid, that the defendants each subscribe and execute an instrument upon a certain printed form designated 'Application for water,' which contained the following words and figures:

'NATIONAL CITY, CAL., — —, 1896.

To the San Diego Land & Town Company:

82 The undersigned hereby applies for a permit to connect service pipes with the mains of the company and for water service under the rules and regulations of the San Diego Land & Town Company, which are expressly made the basis for the appli-

cation and which he agrees to observe for the following purposes and at the following rates for the year ending June 30, 1896.

No.	Monthly rate.	Annual rate.	Total.	Date.
	Family of four persons.			
	Additional persons.			
	Bath.			
	Water-closet.			
	Horses.			
	Horses.			
	Carriages.			
	Cows.			
	“			
	Lot and block property.			
	Lots.			
	“			
	“			
	Irrigated land.			
	Acres.			
	“			
	“			
	Interest charges.			

Total annual rate for the year ending June 30, —, which I agree to pay, quarterly in advance, at the office of the San Diego Land and Town Co.

The water to be furnished under this application to be used on the following land or property :

Lot.	In block.	sec.
National City.		
National ranch.		
Ex-Mission.		

S3 More fully described as follows :

The location of the *top* is on — side of — avenue, street,  
between — and — avenues.

This contract shall remain in force until the first day of next July, when it may be terminated at the request of either party notice to be served in writing ; but in case no such request is made then the same shall continue in force for one year, thereafter, and so on from year to year until such request is made ; which request when made, shall be to terminate this contract on the following July first.

Provided, that if the water is furnished under this application after June 30th, 1896, the same shall be paid for at the rate fixed by the proper authorities, or the rules of the company, for the year the same is furnished, and subject to the rules and regulations of the company, the same to be payable quarterly, unless otherwise provided by said rules and regulations.

Applicant : — — —

SAN DIEGO LAND & TOWN CO.,

By — — —."

32. That part thereof commencing with the word "And," in line 9 of page 33 of said answer, as follows:

"And they aver that said rate of \$3.50 per acre per annum established by said corporation, as set forth in the bill of complaint herein, is the only actual rate for irrigation which has ever been established and collected by said corporation or said receiver, and they aver that the same is the only rate which ever has been legally established or which is to be deemed or accepted as having been legally established by said corporation therefor.

"And these defendants deny that any increase of the rate for such rentals is at all necessary to enable said corporation or its receiver to maintain and operate said plant and pay the proper expenses of such maintenance and operation thereof."

84 33. That part thereof commencing with the word "They," in line 28 of page 33 of said answer, as follows:

"They admit that their rights are the same to the extent that all are freehold easements, as aforesaid, and that the determination of the question of the right of said land & town company and of complainant to increase the rate of rental to be charged and collected will affect all of these defendants in the same way and to the same extent, except that the quantity of land owned by the several defendants is different."

34. That part thereof commencing with the word "But," in line 12 of page 34 of said answer, as follows:

"But the defendants each say, relating to the jurisdiction of this court of the said action against each defendant severally, that on and for a long time prior to January 1st, 1896, there was in force a rule adopted by the San Diego Land & Town Company, which was also adopted by said complainant as its receiver, as follows:

"1. All rates are payable at the company's office, and in all cases, except where the supply is taken through a meter or counter, will be collected in advance and within — (15) days of becoming due, as follows: For miscellaneous and domestic purposes, January, July, and October 1st, in quarterly payments.

"6. In case of non-payment of the water rate within fifteen (15) days after becoming due the supply will be discontinued and will not be again renewed until full and satisfactory settlement of all arrearages shall be made, together with the sum of one dollar for turning on and off."

"That under said rule, on January 4th, 1896, being the time of the filing of the bill of complaint herein, the demand of complainant for increase of rentals 'to enforce the payment' of which complainant caused the water to be shut off from the premises of each of  
85 these defendants until such demanded increase of rentals should be paid, as set forth and stated in the bill of complaint, was for the quarter year beginning with January 1st, 1896, and no longer; that no rental or compensation of any kind had accrued or become due or payable to complainant at the filing of the bill herein except for the said first quarter of said year.

"That such demanded increase of rental for any quarter of the year beginning January 1st, 1896, would, in case of no defendant or

defendants associated as partners, be as much as \$2,000.00, but in each case very much less than that sum, and in case of the defendant having the largest number of acres of land irrigated under said system would not equal \$58.00, and in case of no other as much as \$35.00, and of most others not to exceed \$3.75 each."

35. That part thereof commencing with the word "And," in line 13, page 35, of said answer as follows:

"And these defendants, further answering, say that they have no information, except as derived from the complainant's bill, from the solemn admission of said corporation, and from the records of the recorder's office of the county of San Diego, State of California, as to whether said corporation did borrow \$300,000.00 and as to whether it is compelled *by* pay thereon \$21,000.00 interest annually, or what portion of the said principal sum it applied to the acquisition and construction of its water system, and they deny that it is material for them to further answer any allegation with respect thereto."

36. That part thereof commencing with the word "And," in line 23 of page 35 of said answer, as follows:

"And these defendants, further answering, say that they each have at all times since January 1st, 1896, paid the rate or rental of \$3 50 per acre per annum to the complainant, as such receiver, and are willing and offer to pay the same as long as it continues to be legally established."

37. That part thereof commencing with the word "And," in line 28 of page 35 of said answer, as follows:

"And, further answering, these defendants say that the statute of the State of California of 1885 referred to in the bill of complaint and in this answer of these defendants, in so far as it purports to prohibit the said company from selling, disposing of, or alienating servitudes in freehold upon its said water system or its said property used or useful to the appropriation or furnishing of water, or to prohibit said company from contracting respecting the same, or from receiving full payment, satisfaction, or compensation therefor from any consumer willing to contract, purchase, and pay for the same, and in so far as said statute prescribes that such servitudes shall be enjoyed by the owner of the land to which the same are annexed as easements only upon the terms and conditions that such owners render net annual receipts and profits upon the value thereof in perpetuity, and in so far as said statute purports to prohibit said company and the consumers of water under it from the making of contracts by and between said company and water consumers respecting the annual receipts, profits, and income of any of said property, or to extinguish and satisfy and make acquittance of any right of said company to such net annual receipts, profits, and income, and in so far as such statute prohibits any of the contracts in this answer set forth relating to the sale, transfer, or vesting of the flow and use of water in freehold annexed to the land of the respective defendants herein, and in so far as it prohibits the sale, transfer, and vesting of the ownership of the water rights in the bill of complaint referred to in these defendants respectively and

from becoming annexed to their respective parcels of land, the same is unconstitutional and void as being in conflict with the XIV amendment of the Constitution of the United States, in that  
 87 such statute would deprive said company and these defendants of their liberty without due process of law and would deny them and each of them the equal protection of the laws, and as being in conflict with the declaration of rights contained in section one of the constitution of the State of California, and which said section is in words and figures following to wit:

*“Article 1, Declaration of Rights—Inalienable Rights.*

“SECTION 1. All men are by nature free and independent, and have certain inalienable rights, among which are those of enjoying and defending life, liberty and property, acquiring, possessing and protecting property, and pursuing and obtaining safety and happiness.”

“And as being in conflict with article twenty, section nine, of the constitution of the State of California, which is as follows:

“SECTION 9. No perpetuities shall be allowed, except for eleemosynary purposes.”

38. That part thereof commencing with the word “And,” in line 7 of page 37 of said answer, as follows:

“And each defendant for himself says that his liability to pay rentals or charges of any kind for the service of said system is several and not joint, except only in the case of said defendants associated as partners, which is joint only as between such partners.

“And the defendants say that the following defendants, among others, are not inhabitants or residents of the State of California and are not competent to make petition to the board of supervisors, as provided in section 3 of said act of 1885, to wit:

“T. M. Eaton, Charles Mohnike, the heirs of Schulenburg, deceased; E. J. Elliott, H. E. Klammer, D. S. McBean, Edwin S. Belcher, J. W. Stearns, N. J. Pillsbury, Mary D. Klammer, Arthur Ryan and Michael Mack, L. V. Wright.

88 “And they say that the following-named defendants are public-school corporations and not tax-payers of any county of this State:

Chula Vista School District, Sunnyside School District, Sweetwater School District, and for said reasons are not competent to make such petition.

“And the following-named defendants, among others, are not inhabitants of said county of San Diego, to wit: Edward Gulick, William Gulick, and J. O. Rhinehart, and for said reasons are not competent to make such petition.

“And said defendants, so being incompetent to petition the board of supervisors, as provided by section 3 of said act of 1885, say and all the defendants say that they have no power to compel any sufficient number of competent inhabitants who are tax-payers to join in a petition to the board of supervisors, as provided in said section 3 of said act.”



39. That part thereof commencing with the word "And," in line 3 of page 38 of said answer, as follows:

"And these defendants say that said statute of the State of California approved March 3rd, 1885, in so far as it assumes or purports to authorize or empower said San Diego Land & Town Company or said receiver to increase, as is alleged in the bill of complaint, said rate of \$3.50 per acre per annum heretofore actually established and collected from the defendants without the consent of the defendants and each of them, is in violation of section one of article XIV of the amendments of the Constitution of the United States, and deprives each of them of his and her property without due process of law and denies to each of them the equal protection of the law."

40. That part thereof commencing with the word "And," in line 14 of page 38 of said answer, as follows:

"And these defendants further say that, in so far as said statute of 1885 purports to authorize or empower said land & town company or its receiver to shut off or to justify them or either of them in their act, as set forth in the bill of complaint, in shutting off the water from the lands of these defendants or either of them, or to deprive these defendants or either of them of the enjoyment of their said water rights and of their said easements of the flow and use of such water for the irrigation of their said respective tracts of land as a means of enforcing against these defendants the collection of the increase of rental demanded in the bill of complaint or any increase made without consent of these defendants of the said rate of \$3.50 per acre per annum heretofore actually established and collected from these defendants, and in so far as said statute purports to permit or authorize such enforced collection without permitting these defendants to have any standing in this court to contest the reasonableness of said increase of rates, and in so far as it purports to empower this court or any court to enjoin these defendants or any of them from contesting the reasonableness of said increase of rates in any court, the same is unconstitutional and void as tending to deprive and depriving these defendants and each of them of their property without due process of law, and as tending to deprive and depriving them and each of them of the equal protection of the laws is in violation of section one of the XIV amendment of the Constitution of the United States."

41. That part thereof commencing with the word "And," in line 7 of page 40 of said answer, as follows:

"And these defendants humbly submit and insist that the rate of rental for irrigation of each of their said parcels of land ought not to be changed or altered from the rate of \$3.50 per acre per annum, being the rate and rental actually established and collected by said San Diego Land & Town Company and said receiver, as aforesaid."

42. That part thereof commencing with the word "And," in line 19 of page 40 of said answer, as follows:

90 "And these defendants aver and each of them avers that the acts of said receiver, as set forth in the bill of complaint,

in undertaking to raise the said rate of \$3.50 per acre per annum for irrigation to \$7.00, and in shutting off the water supply, as in the bill of complaint alleged, are and each of them is in violation of article V of the amendments of the Constitution of the United States, as acts done under a color of authority of the United States, tending to deprive and depriving these defendants and each of them of their property without due process of law."

43. That part thereof commencing with the word "And," in line 28 of page 40 of said answer, as follows:

"And these defendants, as matter of supplement to their said answer, state that the legislature of the State of California, at the session thereof held in 1897, passed an act entitled 'An act to amend an act entitled "An act to regulate and control the sale, rental, and distribution of appropriated water in this State other than in city, city and county, or town therein, and to secure the rights of way for the conveyance of such water to the place of use," approved March 12th, 1885, by inserting a new section therein relating to contracts for the sale, rental, and distribution of water, and the sale or rental of easements and servitudes of the right to the flow and use of water,' and which said act was duly approved by the governor of the State of California on the 13th day of March, 1897, and thereupon immediately went into effect.

"And defendants further aver that the addition so by the said amendment made to the said act was a section numbered 11½, and which said section is in the words following, to wit:

"SECTION 11½. Nothing in this act contained shall be construed as prohibiting or invalidating any contract already made, or which shall be hereafter made, by or with any of the persons, companies, associations or corporations described in section two of this act, relating to the sale, rental or distribution of water or to the sale or rental of easements and servitudes of the right to the flow and use of water; nor to prohibit or interfere with the vesting of rights under any such contract."

44. That part thereof commencing with the word "And," in line 20 of page 41 of said answer, as follows:

"And these defendants further aver upon information and belief that by virtue of the said provisions of the Constitution of the United States and of the State of California and under and by virtue of the act of the legislature of March 13, 1897, before mentioned, these defendants and each of them had the right to enter into the contracts with the said San Diego Land & Town Company herein set forth, and the said contracts are valid and effectual, and that the said complainant had no right to make such increased charge for the use of water as aforesaid."

Second. That the defendants by their said answer aver and claim that they have by purchasing lands from the said San Diego Land and Town Company and by the purchase of water rights from said company returned to it a part of its principal invested in its said water works, and that therefore they should not be required to pay rates upon a basis of allowing to said company any interest on the amount of principal so advanced or returned to it, but said answer

is evasive and uncertain, for that it does not show which, if any, of said defendants have so paid or advanced any of the said principal or how much thereof, if any, has been paid or returned to said company by all of said defendants.

Third. That it is admitted by said answer that the actual and just cost of the water works and system of said San Diego Land and Town Company is \$750,000.00, and the law of the State of California allows said company as a reasonable return on said investment the sum of not less than six nor more than ten per cent. not on the said value of said plant and system, and it affirmatively appears from said answer that the annual rental of \$7.00 per acre per annum will not and cannot realize to said company said sum of six per cent. net per annum allowed it by law.

Fourth. That with respect to all of the matters and things in said answer set forth, other than the allegations hereinabove set forth as irrelevant and impertinent, the denials and averments contained in said answer are evasive, imperfect and insufficient, and fail, either separately or as a whole, to show that the matters and things set forth in the bill of complaint herein are not true.

Fifth. That it appears affirmatively from the answer of the defendants that the complainant has legally established and is entitled to collect a water rental of \$7.00 per acre per annum for the irrigation of the lands of the defendants and each of them respectively, and that it is entitled to collect said amount as alleged in the bill of complaint herein unless said rate is unreasonable; and it is further shown and appears from said answer that the defendants have no standing in this court to contest the reasonableness of said rates, but that their remedy, if any they have, is to apply to the board of supervisors of the county in which their said land is situated to fix and establish said rates.

Sixth. That the said answer shows on its face that the complainant is legally and equitably entitled to charge and collect the rate of \$7.00 per acre for the irrigation of the lands of the defendants, and that said rate is reasonable and just.

In all which particulars the complainant is advised that the answer of the defendants is altogether evasive, imperfect, insufficient, and impertinent.

Wherefore said complainant doth except thereto and prays that the defendants may be compelled to amend the same and put in a full and sufficient answer to the complainant's bill.

WORKS & WORKS,

*Solicitors for Complainant.*

That on the 16th day of November, 1897, the complainant, Charles D. Lanning, receiver, served and filed the following notice of motion:

“(Title of Court and Cause)

“The defendants are hereby notified that on Monday, the 22nd day of November, 1897, the complainant, Charles D. Lanning, receiver of the San Diego Land & Town Company, will move the court

for the discharge of the said Charles D. Lanning as such receiver and will, at the same time and place, move the court that the San Diego Land & Town Company of Maine be substituted as complainant in said suit in lieu of the complainant above named.

Said motion will be made at the court-room of said court, in the post-office building, in the city of Los Angeles, State of California, and will be made on the ground that all of the property mentioned and described in the bill of complaint filed herein has, under and by virtue of a decree of this court, been sold by said receiver to the said San Diego Land & Town Company of Maine and the proceeds of such sale received by said receiver, and that said receivership has been fully settled and closed, and that the said San Diego Land & Town Company of Maine has acquired all of the right, title, and interest of the said San Diego Land & Town Company in and to all of said property and is now the only party interested in the further litigation of the questions involved in this suit.

Said motion will be based upon the pleadings, minutes, and proceedings of the court in said cause.

WORKS & WORKS,  
*Solicitors for Complainant.*

94 That on the 22nd day of November, 1897, said court made and entered the following order, to wit:

"CHARLES D. LANNING, Receiver, Complainant,	}	No. 671.
vs.		
H. C. OSBORNE ET AL., Defendants.		

"This cause coming on for hearing at this time on a motion of complainant for substitution of plaintiff, J. D. Works, Esq., of counsel, appearing as solicitor for complainant; John S. Chapman, Esq., of counsel, appearing as solicitor for defendants, is called, and said motion having been argued by respective counsel, it is ordered that the same be submitted to the court for its consideration and decision. It is further ordered that the exceptions to the answer hereinbefore submitted in this case be now sustained; to which ruling of the court defendants, by John S. Chapman, Esq., their counsel, except."

That on the 6th day of December, 1897, the court made and entered in said cause the following order:

"CHARLES D. LANNING, Receiver of the San Diego Land & Town Company, a Corporation, Complainant,	}	No. 671.
vs.		
H. C. OSBORN ET AL., Defendants.		

"This cause having heretofore been submitted to the court for its consideration and decision upon the motion of the complainant, Charles D. Lanning, receiver of the San Diego Land and Town Company, for the discharge of the said Charles D. Lanning, as such receiver, and that the San Diego Land & Town Company of  
95 Maine be substituted as complainant in said suit in lieu of the complainant above named, and the court having duly

considered the same and being fully advised in the premises, it is now, on the 6th day of December, 1897, ordered that said motion be, and the same hereby is, granted, and the San Diego Land & Town Company of Maine be, and hereby is, substituted as complainant in said suit in lieu of the complainant above named; to which ruling of the court defendants, by their counsel, J. S. Chapman, ask and are allowed an exception."

That on the 6th day of December, 1897, the San Diego Land & Town Company of Maine served upon defendants and filed the following notice of motion:

"THE SAN DIEGO LAND & TOWN COMPANY OF MAINE, Com-	}
plainant,	
vs.	
H. C. OSBORN ET AL., Defendants.	

"The defendants in the above-entitled suit are hereby notified that on Monday, the 20th day of December, 1897, at 10:30 o'clock a. m., or as soon thereafter as counsel can be heard, the complainant will, at the court-room of said court, in the Federal building, in the city of Los Angeles, State of California, move the court for an order that the bill in said suit be taken *pro confesso*, and that decree of the court be entered accordingly.

Said motion will be made on the minutes and proceedings of the court and the papers on file in said suit, and will be made upon the ground that exceptions have been sustained to the answer of the defendants, and that they have failed to file an amended answer within the time prescribed by law and the rules of the court.

WORKS & WORKS,  
*Solicitors for Complainant.*"

96 That on Monday, the 20th day of December, 1897, said circuit court made and entered its order as follows:

"That SAN DIEGO LAND & TOWN COMPANY OF MAINE,	}	No. 671.
Complainant,		
vs.		
H. C. OSBORN ET AL., Defendants.		

"This cause coming on this day to be heard, on the motion of complainant for an order that the bill in said suit be taken *pro confesso*, and that a decree of the court be entered accordingly—J. D. Works, Esq., appears as counsel for complainant and A. Haines, Esq., appears as counsel for defendants—now, on motion of defendants' counsel and with the consent of complainant's counsel, it is ordered that the cause be, and the same hereby is, continued two (2) weeks for said hearing."

That on the 27th day of December, 1897, the defendants served upon the counsel for Charles D. Lanning, receiver, complainant, the following notice of motion, to wit:

" (Title of Court )

“CHARLES D. LANNING, Receiver, Complainant,  
vs.  
H. C. OSBORN ET AL., Defendants.”

"To Messrs. Works & Lee, attorneys for complainant :

Take notice that the defendants will on Monday, the 3rd day of January, 1898, move the court at the opening of the court on that day, or as soon thereafter as counsel can be heard for that purpose, to dismiss the suit upon the following grounds, to wit:

First. That the receiver has been discharged and has no further interest in the matter.

Second. That the property has been sold under foreclosure and passed into the hands of another corporation, and the receiver no longer has any charge over it.

Third. That the San Diego Land & Town Company of Maine is not the successor of Lanning, the receiver, and has no interest in the matters alleged in the bill nor any right to prosecute the said action.

Fourth. That neither the original corporation nor the receiver nor any creditor of the said corporation has any interest in the subject-matter of this action, and that since the commencement of said action the board of supervisors of the county of San Diego have passed an order or resolution fixing the rates to be charged by the San Diego Land & Town Company of Maine for furnishing water to the defendants and to all others.

That said motion will be made upon the records and files in the case and the minutes of the court and upon the affidavit of J. S. Chapman; a copy of which is hereto annexed.

C. H. RIPPEY,  
HAINES & WARD, &  
J. S. CHAPMAN,

*Attorneys for said Defendants.*

Dated December 27th, 1897."

"(Title of Court and Cause.)

"STATE OF CALIFORNIA, } 88  
County of Los Angeles, }

J. S. Chapman, being duly sworn, deposes and says that he is one of the attorneys for the defendants in the above-entitled action, and that he is informed and believes and therefore states that since the commencement of this action the board of supervisors of the county of San Diego, State of California, have duly passed an ordinance fixing the rates to be charged for the use of water by the San Diego Land & Town Company of Maine, the successor of the San Diego Land & Town Company of Kansas, as will more fully appear by the certified copy of the ordinance hereto attached and made a part of this affidavit.

And further deponent saith not.

J. S. CHAPMAN.

Subscribed and sworn to before me this 27th day of December, 1897.

[SEAL.]                      ALFRED C. DEZENDORF,  
*Notary Public in and for the County of*  
*Los Angeles, State of California."*

(Certified copy of ordinance annexed.)

That on the 3rd day of January, 1898, the court made and entered its order in words and figures following, to wit:

<p>"THE SAN DIEGO LAND &amp; TOWN COMPANY OF MAINE,          Complainant,  <i>vs.</i>          H. C. OSBORNE ET AL., Defendants.</p>	}	No. 671.
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"This cause coming on this day to be heard on the motion of the defendants that the court dismiss the suit, and also to be heard upon the motion of complainant for an order that the bill in said suit be taken *pro confesso*, and that a decree of the court be entered accordingly, John D. Works, Esq., appearing as counsel for complainant, and J. S. Chapman, Esq., and A. Haines, Esq., appearing as counsel for defendants, and said motions having been presented to the court by counsel, it is now ordered that said motion to dismiss be, and the same hereby is, denied; and the defendants not having answered the bill, it is further ordered that said bill be, and the same hereby is, taken *pro confesso* as against all of said defendants, and that a decree of this court be entered in accordance with the opinions  
 99 of the court on file in this suit; to which ruling of the court defendants, by their counsel, note and allowed an exception."

That afterwards, on the 12th day of February, 1898, without proofs, the court made and caused to be entered in said cause, greatly to the prejudice and injury of your orators, its final decree; which said decree is entered at large upon the records of this court and is in words and figures as follows, to wit:

"In the Circuit Court of the United States, Ninth Circuit, Southern District of California.

2 SAN DIEGO LAND & TOWN COMPANY OF MAINE, Substituted as Complainant in the Place of Charles D. Lanning, Receiver of the San Diego Land & Town Company, Complainant,

*vs.*

H. C. OSBORNE, WILLIAM KNAPP, A. BARBER, MRS. E. L. WILLIAMS, T. M. Eaton, J. M. Davidson, A. J. Smith, A. Hammond, John T. Judkins, Henry Gulick, Sr.; H. S. Whittaker, A. Barnett, J. N. Woodward, A. B. Stephens, John Nickson, J. H. Fawcett, Payne Brown, W. E. Montgomery, Monroe Johnson, A. Haines, M. L. Ward, Ella B. Ward, A. Keene, Fred Keene, E. K. Earle, H. F. Earle, Thomas Walker, A. G. White, W. J. Brower, P. B. Smith, F. B. Merriam, H. Hyatt, H. Stegeman, R. S. Harris, A. A. Gooden, G. A. Dukes, C. H. Rippey, Virginia Rippey, C. C. Jobes, J. L. Griffin, Tallie Spence Sullivan, W. C. Kimball, J. C. Frisbie, S.



- W. Morgan, George Hannahs, Charles O. Brown, F. B. Webb, John Haberfellner, W. S. Wilkins, S. W. Hines, Chula Vista School District, S. Healey, M. E. Phinney, D. L. Murdock, Dan. P. Stetzelberger, R. P. Middlebrook, Anson Titus, W. A. Henry, J. W. Preston, W. E. Ballinger, J. H. Blakeslee, J. Morley, C. F. Wiggins, S. F. Dickinson, O. C. Noyes, J. E. Clouse, Peter Morse, E. W. Dyer, Parsons Shaw, A. C. Crockett, E. E. Flanders, Eliza M. Gavin, Stephen Sheffield, C. A. Whittemore, F. Gardner, Charles Mohmike, Carl Reinisch, David K. Horton, George Henninger, J. M. Cook, O. H. P. Forker, I. N. Lamson, George D. Hayes, A. A. Groat, J. H. Bowen, R. H. Longshare, W. O. Bowen, J. G. Shaw, Julian Field, C. E. Foss, Otto Sollner, A. B. Story, L. E. Allen, C. F. Chadwick, A. R. Schulenburg, James W. Jackson, John H. Ferry, Frank W. Hedges, A. V. Bills, C. L. Barber, A. J. Stokes, T. E. Walker, A. J. Grainger, E. P. Hammack, Wah Hong, Edward Gulick and William Gulick and Henry Gulick, Partners, Doing Business under the Firm Name of Gulick Brothers; John J. Jones, Wm. D. Webber, W. F. Stearns, H. H. Rice, W. J. Henderson, P. W. Morse, O. Darling, Walter Price, S. J. Bradt, R. W. Vaughan, F. A. Moses, E. J. Elliott, M. E. Jennings Verity, J. E. Stephens, R. G. Wallace, George H. Hancock, Frank Howe, I. N. Morse, Emil O. Hoeh, C. S. Johnson, C. W. Ellsworth, Wm. Steckle, J. H. Clough, George L. Henderson, M. Cox, John Johnson, A. T. Burr, A. M. Jameson, H. E. Klammer, J. H. Dean, P. S. Leisenring, J. M. Johnson, Ah Quinn, Ah Lit, J. M. Ballou, S. H. Dale, George M. Tutton, E. P. Lounsbury, George W. De Tar, D. D. Foss, Austin Carey, George J. Jecock, D. S. McBean, Quincy A. Petts, Morton Penfield, J. A. Thomas, J. O. Reinhart, William Doyle, F. O. Reinhart, H. I. Atwater, E. H. Woods, N. H. Downs, Edwin S. Belcher, W. G. Terrii, T. G. Ellis, W. M. Carr, D. F. Garrettson and Elisabeth A. Garrettson, Executors of the Estate of G. A. Garrettson, Deceased; George M. Darnell, Flora B. Arndt, J. W. Stearns, P. W. Beck, M. G. Miller, J. F. Morrill, Fred W. Pearson, Sunnyside School District, N. J. Pillsbury, Julia Latta, Mary R. Klammer, Thomas Lindsay, E. P. Carr, I. M. Howe and H. B. Howe, Partners, Doing Business under the Firm Name of Howe Brothers; Arthur Ryan and Michael Mack, Partners, Doing Business under the Firm Name of Ryan and Mack; F. E. Leslie and H. P. Whitney, Partners, Doing Business under the Firm Name of Leslie & Whitney; James H. Forbes, J. A. Pinkerton, S. D. Murdock, W. Weitekamp, John L. Davis, George H. Eaton, George Rippe, J. H. Greife, F. W. Reid, R. S. Harris, Sweetwater School District, L. W. Goff, George Dashbaugh, William Campbell, Henry Walker, C. C. Hughes, Frank A. Kimball, Henry Haberfellner, F. Mederle, L. C. Wright, Cyrus Johnson, A. W. Howard, Laura F. Meyer, George E. McMurphy, F. H. Downs, N. W. Downs, I. P. Dana, Defendants.

It appearing to the court that on the 5th day of May, 1896, this suit was dismissed as to the defendants I. P. Dana, F. E. Lester,

H. P. Whitney, partners, doing business under the firm name of Lester & Whitney; H. Copeland, George O. Shattuck, J. S. Nickerson, F. A. Moses, John F. Hogan, Charles O. Brown, Fannie Grant, W. D. Bowen, C. W. Ellsworth, William Campbell, Walter Price, J. H. Bowen, William Steckel, H. H. Rice, and Sweetwater Fruit Company, and the exceptions of the complainant to the last amended and further answer of the other defendants, filed herein September 13, 1897, having been by the court sustained, and the said defendants having failed to amend their said answer or to plead further, and the complainant, San Diego Land & Town Company of Maine, having been ordered by this court, made and entered on the 6th day of December, 1897, substituted as complainant in place of the original complainant, Charles D. Lanning, receiver of the San Diego Land & Town Company of Kansas, and an order having been duly entered by this court on the 3rd day of January, 1898, that complainant's bill of complaint herein be taken *pro confesso*, for want of an answer, against all of the defendants except those as to whom the action was dismissed as aforesaid, and thirty days having expired since said last-mentioned order was made:

Now, therefore, as to those defendants against whom this action was dismissed as aforesaid the court finds that said defend-  
102 ants are entitled to a decree of dismissal and for their costs.

The court further finds as against all of the other defendants that the allegations contained in the bill of complaint herein are true, and that the complainant, San Diego Land & Town Company of Maine, is entitled to a final decree against said defendants, in conformity to the opinion of the court filed herein September 14, 1896, and for the costs and expenses laid out and expended herein by said complainant and by the original complainant, Charles D. Lanning, receiver of the San Diego Land & Town Company of Kansas.

It is therefore considered and decreed by the court that this suit be, and the same is, dismissed as to the defendants as to whom the same was dismissed by the complainant as aforesaid, and that they recover of the complainant their costs.

It is further considered and decreed by the court that the defendants herein other than those defendants as to whom this suit has been dismissed as aforesaid be, and they are hereby, perpetually enjoined from prosecuting in the State courts or elsewhere separate actions against the complainant, San Diego Land & Town Company of Maine, to prevent said complainant from collecting or enforcing the collection of the rate of \$7.00 per acre per annum for the irrigation of the lands of said defendants and each of them, fixed and established by the San Diego Land & Town Company and by Charles D. Lanning, receiver, as in the said bill set forth, until the fixing and establishing of such rates by the board of supervisors of the county of San Diego, State of California, or the re-establishment thereof in accordance with law.

It is further considered and decreed by the court that the said San Diego Land & Town Company and Charles D. Lanning, receiver, had the right to increase the amount of the water rentals of said

103 company for water furnished to the lands of said defendants from \$3.50 per acre per annum to the sum of \$7.00 per acre per annum for such irrigation, and that the said defendants be, and they are and each of them is hereby, required to pay to the complainant said rate of \$7.00 per acre per annum for water furnished their lands, as set forth in the bill of complaint herein, from and after the first day of January, 1896, until the fixing and establishing of such rates by the board of supervisors of San Diego county, California, or the re-establishment thereof in accordance with law, as a condition upon which water shall be furnished them by the complainant, and that upon failure of said defendants or any of them to pay said rates the complainant, San Diego Land & Town Company of Maine, be, and it is hereby, authorized to shut off the supply of water to such or any of said defendants who shall fail for five days to make such payment: Provided that the furnishing of water to the defendants for other purposes be not thereby interfered with.

It is further considered and decreed by the court that the complainant recover of said defendants the costs and expenses laid out and expended in this suit by the complainant, San Diego Land & Town Company of Maine, and by the original complainant, Charles D. Lanning, receiver of the San Diego Land & Town Company."

That your orators have paid the costs adjudged against them by said decree in the sum of \$107.15, and have in all things obeyed and performed said decree.

104 And for errors apparent in the orders and decree aforesaid your orators and each of them, among other things, show:

*Errors in Sustaining Exceptions to Answer Numbered First, Second, Third, Fourth, Fifth, Sixth.*

First. That the order made in said cause under date November 22, 1897, sustaining the exceptions and any of the exceptions on part of complainant filed herein on Sept. 22, 1897, to the further answer and the supplemental answer of your orators, defendants in said cause, filed Sept. 13, 1897 (after the expunging of the entire former answers of defendants by the orders of the court sustaining complainant's exceptions thereto for irrelevancy and impertinence), is erroneous in the following respects, to wit:

Said order erroneously treated and considered said exceptions filed September 22, 1897, as raising for decision the merits of the defenses set forth in said answer, and said order expunged said answer from the record and deprived all said defendants, including your orators, of their right to have said answer considered upon the final hearing of said cause, whereas the merits of said defenses were open to decision on the face thereof only upon the setting down of the cause for hearing upon bill and answer, and that your orators were by said order deprived of their rights to have the merits of said defenses on their face regularly determined upon the setting of the cause for hearing on bill and answer, or upon issues raised and proofs made.

*Errors in Sustaining Exception Numbered First to the Further Answer and Supplemental Answer.*

Second. That said order of November 22, 1897, in sustaining of the exceptions filed herein Sept. 22, 1897, to the answer of your orators, filed Sept. 13, 1897, that numbered "first," for alleged immateriality, irrelevancy, and impertinency, is error apparent, 105 in that the expunging thereby of the parts of the answer in said first exception set forth prevented all the defendants from showing upon the record of said cause and from establishing by proofs or otherwise and from having any benefit of the matters and defenses set forth in all such parts of their answer, although neither of the matters excepted to nor any part or parts thereof are immaterial, irrelevant, or impertinent.

And that said order is error apparent in sustaining each subdivision of said first exception and in expunging the portion of the answer in each such subdivision set forth, to wit, subdivision 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44.

That it was error apparent among other errors to consider and adjudge by said order upon said first exception the matters following, to wit:

That all of the allegations of said answer setting forth that the waters and water system of the San Diego Land & Town Company of Kansas were its private property were immaterial, irrelevant, and impertinent.

And that all the allegations of said answer setting forth that said corporation, by the contracts, agreements, conveyances, transfers, acts, representations, classifications, and admissions made by it and made under the circumstances, all as in the answer set forth, did grant to and vest in your orators and did recognize and acknowledge their water rights and freehold easements of the flow and use of water from said water system as appurtenant to lands owned respectively by your orators and as constituting corresponding freehold servitudes on said company's water system were immaterial, irrelevant, and impertinent, and that they were so in virtue of the constitution and laws of the State of California.

106 And that all the allegations of said answer setting forth that all claims and demands of said company for the price or compensation for said water rights, easements, and servitudes had been paid or otherwise satisfied were immaterial, irrelevant, and impertinent, and that all such freehold water rights, easements, and servitudes were void and in conflict with the constitution and laws of said State.

And that all the allegations of said answer setting forth the representations, agreements, and contracts, made by said corporation of Kansas to and with each of your orators, fixing the water rate for irrigation of their lands under their respective water rights, easements, and servitudes at the rate of \$3.50 per acre per annum

were irrelevant, immaterial, and impertinent, and that any such contracts or agreements are in conflict with the constitution and laws of the State of California and void, and that all such allegations of the contractual fixing of water rates in connection with all such allegations of water rights, easements, and servitudes were altogether impertinent in defense to the demand of said corporation and its said receiver to increase without the consent of your orators the rate of \$3.50 per acre per annum for irrigation of their lands to \$7 per acre per annum.

And that all the allegations of said answer setting forth that the rate of \$3.50 per acre per annum for irrigation of the lands of your orators was the only rate which had ever been actually established and collected by said corporation were immaterial, irrelevant, and impertinent.

And that the allegations that your orators were induced to purchase, improve, and settle upon their respective tracts of land in reliance upon said established rate of \$3.50 per acre were immaterial, irrelevant, and impertinent.

And that the allegations that your orators had for more than five years held and enjoyed the use of said water upon their land  
107 for irrigation purposes at said annual rate of \$3.50 per acre, and that the right to have and enjoy the use of said water at said rate became vested in your orators respectively by operation of the statute of limitations of the State of California, were immaterial, irrelevant, and impertinent.

And that the allegations that your orators were induced to purchase, improve, and settle upon their respective tracts of land in reliance upon said established rate of \$3.50 per acre were immaterial, irrelevant, and impertinent.

And that the allegations that your orators had for more than five years held and enjoyed the use of said water upon their land for irrigation purposes at said annual rate of \$3.50 per acre, and that the right to have and enjoy the use of said water at said rate became vested in your orators respectively by operation of the statute of limitations of the State of California, were immaterial, irrelevant, and impertinent.

Amended by  
order of court  
December 5th,  
1898. Wm. M.  
Van Dyke, clerk.

And that all the allegations of said answer setting forth the total irrigation capacity of said water system and the proportion of the same not used and all the other facts and circumstances pertaining to the reasonableness of said increase of rate set forth in said answer were irrelevant, immaterial, and impertinent to be answered to such demanded increase.

And that the denial that said corporation was entitled to demand from your orators water rentals beyond \$3.50 per acre per annum to apply upon the demanded net income of six per cent. per annum was immaterial, irrelevant, and impertinent.

And that the denial that the compensation to said corporation for either of your orators' respective water rights, easements, and servitudes was or still is subject to regulation by any board of supervisors of said State, as provided in said act of 1885, was irrelevant, immaterial, and impertinent.

And that the denial that at the said rate of \$3.50 per acre for irrigation, together with rates for domestic use, if water should be demanded and used upon the whole of the land which the  
108 said system is able to supply with water, said company would not be able to pay its operating expenses and maintain from such rentals its plant and system, and the denial that by reason of said established rate said company was losing money, and the denial that the plant of said company is going to decay, without sufficient resources from said rate for replacing the same, and the denial that said company at said rate of \$3.50 will be compelled to furnish water to consumers at any loss, or that, if said rate of \$3.50 is maintained, said system will be lost, are immaterial, irrelevant, and impertinent.

And that the allegation of the requirement, as a condition to the refraining by said company and its receiver from shutting off the supply of water to each of your orators under their respective water rights and easements, that your orators should subscribe and execute the agreement, designated "Application for water," set forth in the complaint was immaterial, irrelevant, and impertinent.

And that the denial that any increase of the said rate of \$3.50 is at all necessary to enable said corporation or its receiver to maintain and operate said water plant and pay the expenses of the maintenance and operation thereof is irrelevant, immaterial, and impertinent.

That the allegations relating to the amount in controversy as to each of your orators and as affecting the jurisdiction are irrelevant, immaterial, and impertinent.

And that the allegations of the answer which rely upon and invoke the application of the provisions of section one of article XIV and of article V of the amendments to the Constitution of the United States, and which rely upon and invoke the application of section one of article I and of section nine of article XX of the constitution of California, and which rely upon and invoke section  
11½ of the amendment of the act of March 12, 1885, of the  
109 State of California, set forth in said answer, and each of them, are immaterial, irrelevant, and impertinent.

#### *Error in Sustaining the Second Exception.*

Third. That there is error apparent in the said order of November 22, 1897, in that it sustains the second of the exceptions filed herein September 22, 1897, to the answer filed Sept. 13, 1897, inas-

much as the bill of complaint alleges that each of your orators, defendants to said bill, are owners of their water rights and alleges no distinction or discrimination between such rights, whether acquired by purchase or otherwise, and calls for no answer as to which became such owners by purchase and which became owners otherwise, and that the answer is not evasive or uncertain, as alleged, but shows that such water rights, easements, and servitudes, however acquired, are each in freehold, and that each has been created by said corporation of Kansas, and that compensation for each has been paid, or that satisfaction has been otherwise made to said corporation for the same.

*Error in Sustaining Third Exception.*

Fourth. That there is error apparent in the order of November 22, 1897, in so far as it sustains the third of the exceptions filed herein September 22, 1897, to the answer filed Sept. 13, 1897, in that said exception assumes, against the fact, that said answer admits that the just cost of said water system to said corporation of Kansas was \$750,000, and in that said exception assumes, against the fact, that it affirmatively appears by the said answer that the annual rental of \$7 per acre per annum will not and cannot realize to said company the sum of 6 per cent. net income per annum, and in that said exception assumes and said order sustains the assumption that the law of the State of California allows said company, as against your orators, the defendants to said bill, as a reasonable return on their investment the sum of not less than 6 nor more than 110 18 per cent. net on the value of said plant and system without regard to the water rights, easements, and servitudes owned by your orators, as set forth in their said answer, and without regard to the agreements of said company with your orators as to the annual rate of \$3.50 per acre per annum, as set forth in said answer.

*Error in Sustaining Fourth Exception.*

Fifth. That there is error apparent in said order of November 22, 1897, in so far as it sustains the exception numbered fourth of those filed September 22, 1897, to the answer filed Sept. 13, 1897, in that said exception points out no matter in the bill of complaint which is not well and sufficiently answered or respecting which the denials or averments of the answer are evasive, imperfect, or insufficient; wherefore said exception is insufficient in form to point out to or inform the defendants to said bill of any insufficiency in said answer, and on that ground ought not to have been sustained.

And that there is error apparent in said order, in that none of the denials, admissions, or averments in said answer are evasive or imperfect or insufficient.



*Error in Sustaining the Fifth Exception.*

Sixth. That there is error apparent in the order of November 22, 1897, sustaining the exception numbered fifth of those filed September 22, 1897, to the answer filed September 13, 1897, in that said order assumes and decides that the question whether it appears from the answer of the defendants that the complainant receiver has legally established and is entitled to collect a water rental of \$7.00 per acre per annum for the irrigation of the lands of the defendants and each of them respectively is properly triable upon exception to the answer.

And that there is error apparent in said order, in that said exception assumes and said order sustaining it decides that it appears affirmatively or in anywise from said answer that said cor-  
 111 poration of Kansas or said receiver complainant had or has legally established and is entitled to collect a water rental of \$7.00 per acre per annum for the irrigation of the lands of the defendants or any of them.

And that there is further error apparent in said order, in that it sustained the part of said exception charging that the defendants (your orators) had no standing in said court and cause to contest the reasonableness of the rate of \$7.00 per acre per annum demanded by complainant, but that their remedy, if any they have, is to apply to the board of supervisors of the county in which their said land is situated to fix and establish the rates to be paid for such water.

That the order sustaining said exception is error apparent, in that it so construed and applied to this cause the statute of California approved March 12, 1885, referred to in the bill of complaint, as that said statute operated and operates to deprive each of your orators of his and her and its water rights, easements, and servitudes and of the right to enjoy the same at the rate of \$3.50, actually established and collected by said corporation and as established by the contracts, all as in said answer set forth and all without due process of law, and to deprive your orators of their liberty to contract for their said water rights, easements, and servitudes without due process of law, and to deny to each of your orators the equal protection of the laws, all in contravention of section one, article XIV, of the amendments to the Constitution of the United States, and article five of the amendments to the Constitution of the United States, and that said order is error apparent, in that it so construes said statute as that the same conflicts with article one, section 1, of the Constitution of the State of California, and with section nine (9) of article 20 of the Constitution of the State of California.

*Error in Sustaining Sixth Exception.*

112 Seventh. That there is error apparent in the said order of November 22, 1897, in so far as it sustains the exception numbered sixth of the exception filed September 22, 1897, for that it was not competent to raise upon exception to the answer the ques-

tion whether it shows on its face that complainant is legally or equitably entitled to charge and collect the rate of \$7.00 per acre for the irrigation of the lands of your orators or whether said raised rate is reasonable and just.

And for that the facts set forth in said answer do not sustain the charge set forth in said exception and sustained by said order.

Eighth. That there is error apparent in the aforesaid order made and entered on the 6th day of December, 1897, substituting the San Diego Land & Town Company of Maine as complainant in place of the original complainant, Charles D. Lanning, receiver of the San Diego Land & Town Company of Kansas, in that said order was irregular and not in accordance with the practice prescribed by rule 57 of rules of practice for the court of equity of the United States, and that thereby your orators, as defendants to said bill, were denied opportunity to demur, plead, or answer to any supplemental bill setting forth any alleged interest in said cause of the San Diego Land & Town Company of Maine.

Ninth. That there is error apparent in the aforesaid order entered in said cause on the 3rd day of January, 1898, that complainant's bill of complaint be taken *pro confesso* for want of an answer against your orators, defendants to said bill, in this:

That, notwithstanding the sustaining of the exceptions for immateriality, irrelevancy, and impertinence to all those parts of said answer set forth in the exception numbered first and the expunging  
 113 of the same, the admissions, denials, and averments in the answer not excepted to raised material issues in said cause, and that the said order is not warranted by the course of practice in equity or by any equity rule whereby your orators were deprived of a hearing upon the merits of said cause.

### *Errors Apparent in Decree.*

Tenth. That no decree in favor of the complainant ought to have been made or granted on the bill of complaint, for that the decree is not warranted by the allegations of the bill of complaint.

Eleventh. That the decree in said cause is, upon the allegations of the bill of complaint, against the statute law of the State of California entitled "An act to regulate and control the sale, rental, and distribution of appropriated water in this," &c., &c., as approved March 12, 1885, and as amended by the act of the law of said State approved March 2, 1897, in this—

That it appears on the face of said bill that the San Diego Land & Town Company of Kansas at the time when it commenced to furnish water to consumers, to wit, in the year 1887, established the annual rate of \$3.50 per acre for irrigation, and that said corporation and C. D. Lanning, as its receiver, from said date continually maintained and collected said rate and no more from all consumers and at no time collected any other rate, and that said rate at the time of filing said bill was and at the date of said decree remained the only actual rate established and collected by said corporation or its said receiver, and that it further appears by the said bill that

the board of supervisors of the county of San Diego mentioned in the complaint had not fixed or established rates of yearly rental at which said San Diego Land & Town Company should furnish water to consumers.

And that by the said statute law it was and is provided that until such rates should be so established by such board of supervisors the actual rates established and collected by every such corporation should be deemed and accepted as the legally  
114 established rate thereof, and that said statute law further provided and provides that every such corporation furnishing water to lands, as did said Kansas corporation to the defendants (your orators), as alleged in said bill, shall furnish such waters at rates not exceeding the established rates as fixed and established by such corporation as provided in said act, and that said statute provided and provides that every such company shall be obliged to furnish such water at the established rates regulated and fixed therefor as in said act provided to the extent of the actual supply of the waters of such corporation.

That by said decree your orators, defendants in said action, are deprived of the use of water from said system for irrigation at the rate actually established and collected by the San Diego Land & Town Company of Kansas at the time when your orators respectively became owners of their water rights and at the only rates at any time actually established and collected by said corporation or its receiver prior to and since said vesting of the said water rights, to wit, at the rate of \$3.50 per acre per annum.

Twelfth. That the decree in said cause, upon the allegations of the said bill, is against the rights of your orators, named as defendants to said bill, in that said bill of complaint shows upon its face that your orators are the owners respectively of tracts of land under the water system of said San Diego Land & Town Company of Kansas, and that your orators own and hold small tracts of land of only a few acres each, and said bill further shows that each of your orators respectively had become and was the owner of a water right to such part of the water appropriated and stored by said company as is necessary to irrigate his tract of land, subject to such yearly rental as said company was entitled to charge.

That it further appears on the face of said bill that the  
115 annual expense of operating and keeping in repair the reservoir and water system of said company and of furnishing all consumers under said system is, exclusive of interest on the bonds of said company, the sum of \$12,034.99.

That it further appears from said bill that the annual income from water rates collected under said system was \$25,715.00.

And that the rate actually established and collected by said company for furnishing water for irrigation of the lands of your orators and *his* codefendants named in said bill under their said water rights was \$3.50 per acre per annum, and that the proceeds of the same enters into the aggregate annual income of said water system.

And notwithstanding the said bill shows that said company and the said C. D. Lanning, the receiver of said company, the complain-

ant thereon, gave notice to your orators, defendants to said bill, that from and after January 1, 1896, they would demand a rental of \$7.00 per acre per annum for water for irrigation, being twice the rate up to that time actually established and collected by said company or its receiver for furnishing your orators with such water, and notwithstanding that said bill further shows that because your orators and each of them refused to pay said rate of \$7.00 per acre, and maintained that neither said land & town company nor said C. D. Lanning, as receiver thereof, had any legal right to increase the amount of rental to be paid by them or any of them, and maintained that the rate of \$3.50 established and collected by the said land & town company must be and remain the established rate of rental, the said receiver, in order to enforce the payment of said increased rentals, caused the said water to be shut off from the premises of the defendants and each of them, and did deprive your

116 orators, defendants in said action, of the use and enjoyment of their said water rights upon payment of the rates of \$3.50 per acre per annum actually established and collected by said corporation and collected by said receiver.

Yet that the decree herein erroneously holds, decides, and decrees that said San Diego Land & Town Company of Kansas and Charles D. Lanning, receiver thereof, had the right to increase the amount of the water rentals of said company for water furnished to the lands of said defendants from \$3.50 per acre per annum to the sum of \$7.00 per acre per annum without the consent of any of your orators, and erroneously holds, decides, and decrees that your orators shall be required to pay to the San Diego Land & Town Company of Maine said rate of \$7.00 per acre per annum for water furnished to their lands, as set forth in the said bill of complaint, from and after the first day of January, 1896, until the fixing and establishing of such rates by the board of supervisors of San Diego county, California, or the re-establishment thereof in accordance with law as a condition upon which water should be furnished them from said water system, and erroneously holds, decides, and decrees that the San Diego Land & Town Company of Maine is authorized to shut off the supply of water for irrigation of such lands of any of your orators, the defendants to said bill, who should fail for five days to make such payment of arrears of said increase of water rate.

Whereby your orators, the said defendants, are deprived of all benefit of the ownership of their water rights and, notwithstanding said ownership, are required as a condition to the enjoyment of their said easements to pay to said San Diego Land & Town Company of Maine an annual rate to yield, as appears by said bill, an excess over and above the actual cost of repairs, operation, and management of said water system as and for interest and net revenue upon the whole cost and value off said system and without regard to the servitudes thereon owned by your orators.

117 Thirteenth. That the decree in said cause, on its face and on the face of said bill, enforces legislation of the State of California so construed as that it is in violation of sec. one (1) of

article 14 of the amendments of the Constitution of the United States, in that the legislation so construed and enforced maintains the San Diego Land & Town Company of Kansas and C. D. Lanning, its receiver, in increasing the water rentals for water furnished to the lands of your orators for irrigation of their respective lands from \$3.50 per acre per annum to \$7.00 per acre per annum for such irrigation without the consent of your orators, and in that said legislation, so construed and enforced, justifies and maintains the said Kansas corporation and the said receiver and the San Diego Land & Town Company of Maine in having shut off the flow and use of the water under the water rights owned by the defendants to said bill from the lands of such defendants (your orators), as shown in said bill, for refusal to pay such increase of rate, and in that said legislation, as so construed and enforced, requires your orators to pay the San Diego Land & Town Company of Maine the rate of \$7.00 per acre per annum for water furnished their lands, as set forth in said bill of complaint, from and after January 1, 1896, as the condition upon which water shall be furnished them from said water system, and that the legislation so construed and applied authorizes said last-named corporation to shut off the supply of water to any defendant who shall for five days fail to pay such increase of rate; by which means each of your orators is deprived of his, her, and its property without due process of law, and each is likewise deprived of the equal protection of the laws, and each is likewise without due process of law deprived of his, her, and its liberty to purchase or otherwise acquire the water rights in the complaint referred to, and is deprived of his, her, and its liberty to have the benefit of any acquisition, as in the complaint set forth, of such water rights.

And that said decree, for the same reasons, is in contravention of article V of the amendments to the Constitution of the United States, as being an exercise of the judicial power of the United States, whereby your orators are deprived of their property without due process of law, and whereby they are deprived without due process of law of their liberty to contract and acquire property.

Fourteenth. That there is error apparent in said decree in that it was entered *pro confesso* and without proofs upon the allegations of the bill, and without regard to the unexpunged portions of the answer, and without regard to the portions of the answer expunged on said exceptions filed September 22, 1897, and because it ruled, in conformity to the opinion filed in said action Sept. 14, 1896, adopted by and referred to in said decree, that notwithstanding the alleged fact that \$3.50 per acre per annum was the only rate for water supplied for irrigation that had been established and collected by said San Diego Land & Town Company of Kansas or said Charles D. Lanning, receiver, that said San Diego Land & Town Company and Charles D. Lanning, receiver, had the right to increase the amount of the water rentals of said company for water furnished to the lands of defendants (your orators) from \$3.50 per acre per annum to the sum of \$7.00 per acre per annum for such irrigation, and that the contracts with respect to the rates of \$3.50 per acre per

annum, set forth in the answer, were void, as being in conflict with the constitution and laws of the State of California, and because it rules that your orators had no right to be heard before the court on the question of the reasonableness of the rates of \$7.00 per acre per annum, which the complainant in said action sought to enforce and which said decree enforces, and because it rules that the defendants to said bill of complaint (your orators) were not entitled,

119 upon the question of the rightfulness and lawfulness of the increase of the rate of \$3.50 per acre per annum to \$7.00 per acre per annum, to have any benefit of the ownership of their respective water rights, as set forth in the bill of complaint, or of their freehold easements and servitudes upon said company's water system, as set forth in their answer, nor of the alleged fact that each had paid or made satisfaction to said San Diego Land & Town Company of Kansas for the price demanded by it for his, her, and its such water right, easement, and servitude.

That in point of law, among other things, said errors are, to wit :

1st. Said decree in said respects erroneously construes and applies the provisions of the constitution and laws of the State of California referred to in the bill of complaint and answer.

2nd. That said provisions of the constitution and laws, as so construed and applied by said decree, are in contravention and repugnant to article XIV, sec. 1, of the amendments to the Constitution of the United States, as depriving your orators of their property without due process of law, and as depriving them of their liberty of contract without due process of law.

3rd. That in applying the said provisions of the State constitution and statutes, as so construed by said decree and the opinion referred to therein, the judicial power of the United States was exercised in contravention of article V of the amendments to the Constitution of the United States, and deprived the defendants in said action (your orators) of their property without due process of law and of their liberty of contract without due process of law.

4th. And that the provisions of article XIV of the constitution of the State of California, as so construed, applied, and enforced by said decree, are in violation of the guarantee, by section IV of ar-

120 ticle IV of the Constitution of the United States, of a republican form of government to said State of California, in that by said provision of the constitution of said State, as so construed, applied, and enforced, the said State assumes the absolute control of all water appropriated and devoted to sale, rental, and distribution, and the absolute control of all works devoted to the supplying or distribution of such waters ; abolishes all capacity for the acquisition of private property rights, easements, or servitudes in such water supply and water works ; abolishes all right to unite the ownership of any water supply from any such system with the ownership of lands for irrigation thereof by contract of purchase and payment or otherwise ; abolishes all right or capacity for the acquisition of any water right, easement, or servitude in or upon any such water system, by purchase or otherwise, free from the perpetual obligation to pay net revenue, as the said statute now stands, of not less than six nor



more than eighteen per cent. per annum upon the cost or value of such water system, and abolishes all right or capacity to ascertain, fix, and define by contract or convention the rate or compensation to be paid by any consumer for the supplying of any such waters for irrigation of land.

Fifteenth. That there is error apparent in said decree in that said decree is made in favor of the San Diego Land & Town Company of Maine, although said corporation has not become a party to the record in said cause by supplemental bill or otherwise; and what interest, if any, said corporation hath or had in said action does not appear upon the record, nor was any claim on its part to any interest so set forth that the defendants to said bill of complaint, your orators, could in anywise make answer thereunto or plead thereunto.

Sixteenth. That there is error apparent in said decree in that this court was without jurisdiction to entertain said cause or to make any decree upon the merits therein.

121 Seventeenth. That there is error apparent in the said order of the court made on the 3rd day of January, 1898, denying the motion of defendants in said cause to dismiss said suit and in retaining the jurisdiction thereof after the discharge of C. D. Lanning, receiver, the complainant therein, made by order of the court on the 6th day of December, 1897.

Amended by order of court December 5th, 1898. Wm. M. Van Dyke, clerk.

Wherefore, as said errors appear on the face of the record and are greatly prejudicial to complainants and [his]\* <sup>their</sup> rights in the premises, complainants pray that said decree may be reviewed, reversed, and set aside and no further proceedings taken therein; and to that end complainants pray process by subpoena against the San Diego Land & Town Company of Maine, requiring it to appear and answer hereunto and show cause, if it may, why said decree should not be reviewed, reversed, and set aside, and such further orders and decrees be made as to the court may seem just, including the restoration to your orators of the sum of money paid under said decree as aforesaid.

C. H. RIPPEY AND  
HAINES & WARD,  
*Solicitors for Complainants.*

(Endorsed.) Circuit court of the United States, ninth circuit, southern district of California. H. C. Osborn *et al.*, complainants, *vs.* San Diego Land & Town Company of Maine, defendants. Bill of review. C. H. Rippey, Haines & Ward, solicitors for complainants. No. 839. U. S. circuit court, southern district of California. H. C. Osborn *et al. vs.* San Diego Land & Town Company of Maine. Bill of review. Filed Aug. 12, 1898. Wm. M. Van Dyke, clerk. E. H. Owen, deputy clerk.

[\*Word enclosed in brackets erased in copy.]



122 In the Circuit Court of the United States, Ninth Circuit,  
Southern District of California.

H. C. OSBORNE ET AL., Complainants,

vs.

SAN DIEGO LAND AND TOWN COMPANY OF MAINE, Defendant. }

The defendant moves the court to strike the bill of complaint in the above-entitled suit from the files of said court and to dismiss said suit on the ground that the decree in the suit of San Diego Land and Town Company of Maine *vs.* H. C. Osborne *et al.*, mentioned and set forth in the said bill of complaint and sought to be reviewed herein, has not been performed or complied with, nor has leave been obtained from this court for the complainants to prosecute this suit without performing or complying with said decree.

WORKS & WORKS,

WORKS & LEE,

*Solicitors for Defendant.*

The complainants are hereby notified that on the 5th day of September, 1898, at 10.30 o'clock a. m., or as soon thereafter as counsel can be heard, the defendant, San Diego Land and Town Company of Maine, will, at the court-room of said court, in the Federal building, in the city of Los Angeles, State of California, move said court as set forth in the above and foregoing motion.

Said motion will be made on the grounds set forth therein, and will be based upon the pleadings, minutes, proceedings, and decree in the said case of San Diego Land and Town Company of Maine, substituted instead of Charles D. Lanning, receiver, *vs.* H. C. Osborne *et al.*, bill of complaint in this suit of H. C. Osborne *et al.* *vs.*

123 San Diego Land and Town Company of Maine, and the affidavit of John E. Boal, copy of which is served with this notice.

WORKS & WORKS,

WORKS & LEE,

*Solicitors for Defendant.*

124 In the Circuit Court of the United States, Ninth Circuit,  
Southern District of California.

H. C. OSBORN ET AL., Complainants,

vs.

SAN DIEGO LAND & TOWN COMPANY, Defendant. }

John E. Boal on his oath says that he is the general manager of the defendant in the above-entitled case; that it is adjudged and decreed in the final decree made and entered in the case of San Diego Land & Town Company of Maine *vs.* H. C. Osborn *et al.*, set forth in the bill of complaint herein, as follows:

"That the said defendants be, and they are and each of them is hereby required to pay to the complainant said rate of \$7.00 per acre per annum for water furnished their lands, as set forth in the bill of

complaint herein, from and after the 1st day of January, 1896, until the fixing and establishing of such rates by the board of supervisors of San Diego county, California, or the re-establishing thereof in accordance with law."

That the complainants herein have had and used the waters of the defendant for the irrigation of their lands mentioned and described in the pleadings and proceedings set forth in the bill of complaint herein from the 1st day of January, 1896, until the present time, and have not, as provided in said decree, paid the said rate of \$7.00 per acre per annum therefor, but have paid only the sum of \$3.50 per acre per annum, and have refused and still refuse to pay any greater amount therefor, and have insisted and maintained and do now insist and maintain that said rate of \$7.00 per acre per annum decreed by this court to be the legally established rate is  
125 illegal and void.

That the board of supervisors of the county of San Diego, California, did not fix or establish rates to be charged by the defendant herein until the 16th day of October, 1897, nor have the rates fixed by the said San Diego Land & Town Company of Kansas and the receiver of said company, Charles D. Lanning, been re-established in accordance with law.

JOHN E. BOAL.

Subscribed and sworn to before me this 19th day of August, 1898.

[SEAL.]

JERAULD INGLE,  
*Notary Public in and for the County  
of San Diego, State of Calif.*

(Endorsed :) No. 839. U. S. circuit court, ninth circuit, southern district of California. H. C. Osborne *et al.*, complainants, vs. San Diego Land & Town Co. of Maine, defendant. Notice of motion to strike bill from files. Received copy of the within notice Aug. 29, 1898. Haines & Ward, solicitors for complainant. Filed Oct. 27, 1898. Wm. M. Van Dyke, clerk. Works & Works, Wells & Lee, Works & Lee, rooms 420 to 425 Henne building, Los Angeles, Cal., solicitors for defendant.

126 In the Circuit Court of the United States, Ninth Circuit, Southern District of California.

H. C. OSBORN ET AL., Complainants,	}	Affidavit.
<i>vs.</i>		
SAN DIEGO LAND & TOWN COMPANY OF MAINE, De-	}	
fendants.		

COUNTY OF SAN DIEGO, }  
State of California, } ss :

Monroe Johnson, being duly sworn, on his oath says—

That he is one of the complainants in the above-entitled cause and one of the defendants in the suit of The San Diego Land &

Town Company of Maine *v. H. C. Osborn et al.*, numbered 671, mentioned in the bill of complaint and in the motion of defendant herein to strike said bill from the files of the court and dismiss this suit.

That the affidavit of John E. Boal, filed with said motion, does not correctly or truthfully set forth the relief part of the decree in said cause 671, but that said decree is fully and correctly set forth in the bill of complaint herein.

That the water rates to be charged by defendant were fixed and established by the board of supervisors of the county of San Diego, California, on October 16, 1897, as stated in the said affidavit of said Boal, and that the rate so fixed for irrigation was and remains \$3.50 per acre per annum.

That the decree in said cause 671 was entered on March 12, 1898.

That neither this affiant nor, as he is credibly informed and believes, did any other complainant herein and defendant to  
127 said decree use any water from said company's system for irrigation after said decree until nearly June 1, 1898.

That on or about March 26, 1898, these plaintiffs, among other consumers, entered into a written agreement with The San Diego Land & Town Company, defendant herein, for the apportionment of the water in said company's reservoir, which was signed by said company and generally by the plaintiffs, a copy of which, except signatures, is shown by "Exhibit A," hereto annexed.

That the average of said apportionment is about one-half the normal supply, and that by said apportionment the plaintiff conceded to the said company as a consumer some of their claims as prior consumers to a full supply and shared the same with said company and others as later consumers.

That thereupon the larger proportion of these plaintiffs bought and the remainder hired meters of said land & town company for measuring to plaintiffs the water pursuant to said agreement for apportionment.

That said company commenced to deliver water for irrigation to plaintiffs and others about said first of June, 1898, through said meters, under and pursuant to said agreement of apportionment and not otherwise, and has exclusively managed and controlled such delivery according to said apportionment ever since, and has actively aided complainants in taking and using such apportioned waters, and that prior to October 1, 1898, the supply of water from said system for irrigation was exhausted, leaving many of the consumers much short of the supply apportioned to them by said agreement, and by that date irrigation ceased.

That none of the complainants since the entry of said decree has had or used any water of the defendant for the irrigation of any of their lands against the will or without the consent of the company or otherwise than with the consent and concurrence of said company and under said written agreement of apportionment, and that since said decree the said company has at all times up to this date

sent bills to these complainants for the rental of said water  
128 at the rate of \$3.50 per acre per annum, being the full ordinance rate, notwithstanding the short supply and the entire cessation aforesaid, in the form shown by Exhibit "B," hereto annexed, and the complainants have uniformly paid the same and the company has accepted the same.

That none of these complainants have at any time since the signing of said decree used or threatened to use any legal or other compulsion to cause said company to forego the condition prescribed in said decree to its obligation to furnish water to these complainants, but that said company has of its own will and discretion refrained from availing itself of said condition, and has either suspended or waived the same during all the time it has so furnished said water.

That these complainants have not taken, used, or threatened to take or use the waters from said company's system in violation of the condition imposed by said decree, but have, as they believe, in all things obeyed said decree where passive obedience is required by it, and have performed it where it has imposed upon them an unconditional and affirmative duty or command.

That none of these complainants have insisted or maintained or do insist or maintain that said decree shall not be respected and obeyed, or maintain or insist upon any right, except such as they may properly exercise, to have the same reviewed in this court and appellate courts; that neither of them maintain or insist that the rate of \$7.00 per acre per annum decreed by this court to be the legally established rate is illegal and void, as long as said decree remains in force, as is alleged in the affidavit of John E. Boal, but they only by their bill of review herein seek to maintain that there is error apparent in such decree as ground for reviewing and reversing the same.

And affiant for himself and his co complainants avers as ground of appeal to the discretion of the court herein that the complainants, as defendants to the original bill in said cause 671, have presented as a defense the fact that the rate of \$3.50 per acre per annum was  
the only rate actually established and collected by the San  
129 Diego Land & Town Company of Kansas and its receiver, and have submitted in said action that under section five of the act of 1885 such rate was equally binding upon said company, its successor in interest, and these complainants; that they conceive that any voluntary payment by them of the rate of \$7 per acre per annum would be to consent to a change of the rate for irrigation from \$3.50 per acre per annum to \$7.00 per acre per annum, which would then become the rate actually established and collected.

That complainants are apprehensive that the voluntary payment of said rate would deprive them of their standing to insist on review or otherwise that \$3.50 was the only rate actually established and collected.

That whether said position is well or ill founded, it is taken in good faith, and plaintiffs appeal to the discretion of the court that they be not required to change their position in the controversy to their possible detriment as a condition to submitting their bill of review herein.

MONROE JOHNSON,

Subscribed in my presence and sworn to before me, by said Monroe Johnson, this 21st day of October, 1898.

M. L. WARD,

*Notary Public in and for the County of  
San Diego, State of California.*

[SEAL.]

Ninth Circuit, Southern District of California, San Diego County.

STATE OF CALIFORNIA, ss :

We, F. B. Merriam, A. C. Crockett, Ira Howe, W. J. Henderson, and P. B. Smith, each being duly sworn, each for himself says that he has heard the foregoing affidavit of Monroe Johnson read; that he is a complainant in said cause, and is informed and knows concerning the facts deposed to by said Johnson, and that the facts stated in the affidavit by said Johnson are true.

F. B. MERRIAM.

A. C. CROCKETT.

IRA HOWE.

W. J. HENDERSON.

P. B. SMITH.

130

Subscribed and sworn to before me and in my presence this 3rd day of November, 1898.

[SEAL.]

M. L. WARD,

*Notary Public in and for San Diego County, Cal.*

131

"EXHIBIT A."

*Agreement.*

E. J. Swayne moved that the form of contract to be submitted to the consumers be as follows and preceded by the agreement of the San Diego Land & Town Company as follows:

The undersigned San Diego Land & Town Company of Maine agrees to the following apportionment of the water in accordance with the following apportionment adopted at the mass meeting of consumers at National City March 26th, 1898, and as consumers we agree to accept and take only our quantity as herein apportioned for the time and in the manner herein provided.

The undersigned consumers of water, under the Sweetwater system, in view of the short visible supply impounded in the reservoir of the system for use the present season, hereby mutually agree to the following apportionment of the supply of water now in the reservoir for irrigation among consumers, such apportionment to apply to water now impounded; said apportionment is as follows:

To trees planted in 1897, 45,000 gals. per acre, which am'ts to.....	2,430,000
To trees planted in 1898, 66,000 gals. per acre, which am'ts to.....	14,220,000
To trees planted in 1895, 72,000 gals. per acre, which am'ts to.....	46,584,000

To trees planted in 1894, 90,000 gals. per acre, which am'ts to.....	33,210,000
To trees planted in 1893, 110,000 gals. per acre, which am'ts to.....	61,600,000
To trees planted in 1892, 135,000 gals. per acre, which am'ts to.....	94,095,000
To trees planted in 1891, 170,000 gals. per acre, which am'ts to.....	131,920,000
To trees planted in 1890, 210,000 gals. per acre, which am'ts to.....	275,100,000
	<hr/> 659,159,000

Vegetable gardens, nurseries, alfalfa, ornamental trees, and lawns are to be counted as trees planted and receive the same apportionment of water according to trees planted in 1890.

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*Exhibit A Continued.*

In case of increase of supply the apportionment to be proportionately increased.

We hereby authorize the San Diego Land & Town Company during the season of 1898 to apportion the said water in accordance with the above schedule and apportionment and to distribute to themselves, as consumers of water, the same proportion that would fall to the lot of any other consumer according to the class to which he belongs.

But it is expressly understood that by this agreement we waive no right as consumers or land-owners as between ourselves or the company beyond granting the license to prorate water, as above, for the present season.

We further agree that the following committee of seven, appointed pursuant to the action of the mass meeting of consumers held March 26, 1898, to wit, R. C. Allen, L. E. Allen, L. W. Goff, D. K. Adams, E. Thelan, E. J. Swayne, and A. Haines, be authorized to represent us in all matters connected with the foregoing agreement and to act as arbitrators in the dispute between consumers or with the company growing out of the same.

SAN DIEGO LAND & TOWN COMPANY,

By ————

133

*Exhibit A Continued.*

The undersigned agrees to purchase for himself or co-jointly with others the meter or meters required to measure the water apportioned to his or their lands.

The undersigned herewith applies for meter under ordinance governing same, and agrees that said meter may be available only during the time allotted for delivering the water apportioned.

Name. No. of meter. Size.

Name. No. meter. Size.

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## EXHIBIT B.

San Diego Land & Town Company, water department.

Checks should be made payable to the order of and all remittances addressed to E. A. Hornbeck, assistant treasurer, National City, Cal.

This company claims that while the amount herein named is in accordance with rates established by board of supervisors, it is inadequate compensation for the water so furnished, and its right and claim to be paid for such water in full at such rates as may be hereafter fixed, pursuant to a decree of court or otherwise, is in no manner waived or compromised by the acceptance of the amount named below.

NATIONAL CITY, CAL., — —, 189—.

Office hours, 8.00 a. m. to 5 p. m.

Saturdays, 8 a. m. to 2 p. m.

DEAR SIR: Your water rent for the — months ending — is now due. Remit by check, if convenient.

Please return this notice.

Register No. —. Amount, —.

Respectfully,

E. A. HORNBECK,  
*Assistant Treasurer.*

Delinquent after the 15th of current month.

135 (Endorsed:) No. 839. In the circuit court of the United States for the ninth circuit, southern district of California. H. C. Osborn *et al.*, plaintiff, *vs.* San Diego Land & Town Company of Maine, defendant. Aff'd't on part of complainants, on motion to remove bill of review from the files. Filed Nov. 7, 1898. Wm. M. Van Dyke, clerk. Haines & Ward, corner Fourth and D streets, San Diego, Cal., solicitors for complainants.

136 At a stated term, to wit, the August term, A. D. 1898, of the circuit court of the United States of America of the ninth judicial circuit in and for the southern district of California, held at the court-room, in the city of Los Angeles, on Monday, the 21st day of November, in the year of our Lord one thousand eight hundred and ninety-eight.

Present: The Honorable Erskine M. Ross, circuit judge.

H. C. OSBORNE ET AL., Complainants,

SAN DIEGO LAND AND TOWN COMPANY OF MAINE, } No. 839.  
Defendant. }

This cause having heretofore been submitted to the court for its consideration and decision on defendant's motion to strike the bill of complaint from the files and to dismiss said suit, and the court



having duly considered the same and being fully advised in the premises, it is now, on this 21st day of November, 1898, being a day in the August term, A. D. 1898, of said circuit court of the United States for the southern district of California, ordered that said motion to strike the bill of complaint from the files and to dismiss said suit be, and the said motion hereby is, denied.

137 I, Wm. M. Van Dyke, clerk of the circuit court of the United States for the southern district of California, do hereby certify the foregoing to be a full, true, and correct copy of an original order made and entered by said court November 21st, 1898, in the cause entitled *H. C. Osborne et al., complainants, vs. The San Diego Land and Town Company of Maine, defendant*, No. 839, and remaining of record therein.

[SEAL.] Attest my hand and the seal of said circuit court this 5th day of December, A. D. 1898.

WM. M. VAN DYKE, *Clerk.*

(Endorsed:) No. 839. U. S. circuit court, ninth circuit, southern district of California. *H. C. Osborne et al. vs. San Diego Land & Town Company of Maine.* Certified copy of order denying motion to strike bill from files. Filed Dec. 5, 1898. Wm. M. Van Dyke, clerk.

138 In the Circuit Court of the United States, Ninth Circuit, Southern District of California.

H. C. OSBORNE ET AL., Complainants,

vs.

SAN DIEGO LAND AND TOWN COMPANY OF MAINE, Defendant. }

The defendant, The San Diego Land and Town Company of Maine, by protestation, not confessing or acknowledging all or any of the matters or things in the amended bill of complaint contained to be true in such manner or form as therein set forth and alleged, presents and files this its demurrer to the said bill, and for cause of demurrer shows:

1. That it appears by the complainants' own showing in said bill that there is and was no error in the proceeding or decision of said court in the case of Charles D. Lanning, receiver of the San Diego Land and Town Company, *vs. H. C. Osborne*, mentioned and set forth in the bill herein, appearing on the face of the record or otherwise.

2. That it appears from the complainants' own showing in their said bill that they are not nor are any of them entitled to the relief prayed for in their said bill or any relief.

3. That it appears from their own showing by their said bill that there is no such error appearing on the face of the proceedings in the said suit of Lanning, receiver, *vs. H. C. Osborne et al.* or otherwise as can be relieved against by bill of review or a bill in the nature of a bill of review.

139 4. That it appears from the complainants' own showing by their said bill that the remedy of the complainants, if any they have, is by appeal and not by bill of review.

Wherefore, and for divers other good causes of demurrer appearing in said bill, the said defendant, here demurring, demurs thereto, and it prays the judgment of this honorable court whether it should be required to make any answer to the said bill, and it prays to be hence dismissed with its reasonable costs in this behalf sustained.

WORKS & WORKS,  
WORKS & LEE,  
*Solicitors for Defendant.*

We hereby certify that in our opinion the foregoing demurrer is well founded in point of law.

WORKS & WORKS,  
WORKS & LEE,  
*Solicitors for Defendant.*

STATE OF CALIFORNIA, }  
County of San Diego, } ss.

John E. Boal, being duly sworn, says he is the general manager of the defendant in the action mentioned in the foregoing demurrer, and that said demurrer is not interposed for delay.

JOHN E. BOAL.

Subscribed and sworn to before me this 25th day of November, 1898.

[SEAL.] LEWIS R. WORKS,  
*Notary Public in and for the County of  
San Diego, State of California.*

(10c. int. rev. stp.)

140 (Endorsed :) No. 839. U. S. circuit court, ninth circuit, southern district of California. H. C. Osborne *et al.*, complainants, *vs.* San Diego Land and Town Company of Maine, defendants. Demurrer to bill. Received copy of the within demurrer Nov. 25th, 1898. Haines & Ward, solicitors for complainant. Filed Nov. 26, 1898. Wm. M. Van Dyke, clerk. Works & Works and Works & Lee, rooms 420 to 425 Henne building, Los Angeles, Cal., solicitors for defendant.

141 At a stated term, to wit, the August term, A. D. 1898, of the circuit court of the United States of America of the ninth judicial circuit in and for the southern district of California, held at the court-room, in the city of Los Angeles, on Monday, the 28th day of November, in the year of our Lord one thousand eight hundred and ninety-eight.

Present: The Honorable Erskine M. Ross, circuit judge.

H. C. OSBORNE ET AL., Complainants,	} No. 839.
vs.	
SAN DIEGO LAND AND TOWN COMPANY OF MAINE, Defendant.	

By consent of counsel for the respective parties, this cause coming on this day to be heard on the demurrer of the defendant to complainants' bill of complaint, now, pursuant to the stipulation of the said counsel for the respective parties, it is ordered that said demurrer be, and the same hereby is, submitted to the court for its consideration and decision, and thereupon, the court having duly considered the same and being fully advised in the premises, it is now ordered that said demurrer be, and the same hereby is, sustained, with leave to the complainants to amend their said bill of complaint within ten (10) days.

142 I, Wm. M. Van Dyke, clerk of the circuit court of the United States for the southern district of California, do hereby certify the foregoing to be a full, true, and correct copy of an original order made and entered by said court November 28th, 1898, in the cause entitled H. C. Osborne *et al.*, complainants, *vs.* The San Diego Land and Town Company of Maine, defendant, No. 839, and remaining of record therein.

Attest my hand and the seal of said circuit court this [SEAL.] 5th day of December, A. D. 1898.

WM. M. VAN DYKE, *Clerk.*

(Endorsed :) No. 839. U. S. circuit court, ninth circuit, southern district of California. H. C. Osborne *et al.* *vs.* San Diego Land & Town Company of Maine. Certified copy of order sustaining demurrer. Filed Dec. 5, 1898. Wm. M. Van Dyke, clerk.

143 In the Circuit Court of the United States, Ninth Judicial Circuit, Southern District of California.

No. 839.

H. C. OSBORNE, WILLIAM KNAPP, A. BARBER, MRS. E. L. WILLIAMS, T. M. Eaton, J. M. Davidson, A. J. Smith, A. Hammond, John T. Judkins, Henry Gulick, Sr., H. S. Whittaker, A. Barnett, J. N. Woodward, A. B. Stephens, John Nickson, J. H. Fawcett, Payne Brown, W. E. Montgomery, Monroe Johnson, A. Haines, M. L. Ward, Ella B. Ward, A. Keene, Fred Keene, E. K. Earle, H. F. Earle, Thomas Walker, A. G. White, W. J. Brower, P. B. Smith, F. B. Merriam, H. Hyatt, H. Stegeman, R. S. Harris, A. A. Gooden, G. A. Dukes, C. H. Rippey, Virginia Rippey, C. C. Jobes, J. L. Griffin, Tallie Spencer Sullivan, W. C. Kimball, J. C. Frisbie, S. W. Morgan, George Hannahs, F. B. Webb, John Haberfellner, W. S. Wilkins, S. W. Haines, Chula Vista School District, S. Healey, M. E. Phinney, D. L. Murdock, Dan. P. Stetzelberger, R. P. Middlebrook, Anson Titus, W. A. Henry, J. W. Preston, W. E. Ballinger, J. H. Blakeslee, Herman Banke, J. C. Alles,

- D. K. Adams, A. J. Morley, C. F. Wiggins, S. F. Dickinson, O. C. Noyes, J. E. Clouse, Peter Morse, E. W. Dyer, Parsons Shaw, A. C. Crockett, E. E. Flanders, Elisha M. Gavin, Stephen Sheffield, C. A. Whittemore, F. Gardner, Charles Monnike, Carl Reinisch, David K. Horton, George Henninger, J. M. Cook, O. H. P. Forker, I. N. Lamson, George D. Hayes, A. A. Groat, R. H. Longshore, J. G. Shaw, Julian Field, C. E. Foss, Otto Sollner, A. B. Story, L. E. Allen, C. F. Chadwick, A. R. Schulenburg, James W. Jackson, John H. Ferry, Frank W. Hedges, A. V. Bills, C. L. Barber, A. J. Stokes, T. E. Walker, A. J. Grainger, E. P. Hammack, Wah Hong, Edward Gulick and William Gulick  
 144 and Henry Gulick, Partners, Doing Business under the Firm Name of Gulick Brothers; John J. Jones, Wm. D. Webber, W. F. Stearns, W. J. Henderson, P. W. Morse, O. Darling, S. J. Bradt, R. W. Vaughan, E. J. Elliott, M. E. Jennings Verity, J. E. Stephens, R. G. Wallace, George H. Hancock, Frank Howe, I. N. Morse, Emil O. Hoeh, C. S. Johnson, J. H. Clough, George L. Henderson, M. Cox, John Johnson, A. T. Burr, A. M. Jameson, H. E. Klammer, J. H. Dean, P. S. Leisenring, J. M. Johnson, Ah Quinn, Ah Lit, J. M. Ballou, S. H. Daic, George M. Tutton, E. P. Lounsbury, George W. De Tar, S. D. Foss, Austin Carey, George J. Jecock, D. S. McBean, Quincy A. Petts, Morton Penfield, J. A. Thomas, J. O. Reinhart, William Doyle, F. O. Reinhart, H. I. Atwater, E. H. Woods, N. H. Downs, Edwin S. Belcher, W. G. Terril, T. G. Ellis, W. M. Carr, D. F. Garrettson and Elisabeth A. Garrettson, Executors of the Estate of G. A. Garrettson, Deceased; George M. Darnell, Flora B. Arndt, J. W. Stearns, P. W. Beck, M. G. Miller, J. F. Morrill, Fred W. Pearson, Sunnyside School District, N. J. Pillsbury, Julia Latta, Mary R. Klammer, Thomas Lindsay, E. P. Carr, I. M. Howe and H. B. Howe, Partners, Doing Business under the Firm Name of Howe Brothers; Arthur Ryan and Michael Mack, Partners, Doing Business under the Firm Name of Ryan and Mack; James H. Forbes, J. A. Pinkerton, S. D. Murdock, W. Weitekamp, John L. Davis, George H. Eaton, George Rippe, J. H. Griefe, F. W. Reid, R. S. Harris, Sweetwater School District, L. W. Goff, George Dashbaugh, Henry Walker, C. C. Hughes, Frank A. Kimball, Henry Haberfellner, F. Mederle, L. C. Wright, Cyrus Johnson, A. W. Howard, Laura F. Meyer, George F. McMurphy, F. H. Downes, N. W. Downes, Complainants,

vs.

SAN DIEGO LAND & TOWN COMPANY OF MAINE, Defendant.

- 145 The complainants filed their bill of review herein on the 12th day of August, 1898, which is hereto annexed.

On the 27th day of October, 1898, the defendant appeared herein, by Messrs. Works & Works and Messrs. Works & Lee, its solicitors.

On the 27th day of October, 1898, defendant filed herein its notice of motion to strike the bill of complaint from the files and to dismiss said suit; which notice and the affidavit of John E. Boal, referred to therein, are hereto annexed.

On the 7th day of November, 1898, said motion came on regularly for hearing before the *the* court—present, the Honorable Erskine M. Ross, circuit judge—whereupon the affidavit of Monroe Johnson was filed herein on behalf of complainants, which affidavit is hereto annexed, and said motion, having been argued by counsel, was thereupon submitted to the court for its consideration and decision.

On the 21st day of November, 1898, the court made and entered an order herein denying said motion to strike the bill of complaint from the files and to dismiss said suit, a copy of which order is hereto annexed.

The demurrer of defendant to complainants' bill was filed herein on the 26th day of November, 1898, and is hereto annexed.

On the 28th day of November, 1898, the court made and entered an order herein sustaining said demurrer, a copy of which order is hereto annexed.

On the 5th day of December, 1898, being a day in the August term, A. D. 1898, of said circuit court—present, the Honorable Erskine M. Ross, circuit judge—came complainants in the suit, by A. Haines, Esq., their counsel, and in open court elected to stand on their bill of complaint, and declined to amend their said bill of complaint, as they were allowed to do by the order of the court entered November 28th, 1898; whereupon, on motion of John D.

146 Works, Esq., of counsel for defendant, a decree dismissing complainants' said bill was signed, filed, entered and recorded herein, and is hereto annexed.

147 In the Circuit Court of the United States, Ninth Circuit, Southern District of California.

H. C. OSBORNE, WILLIAM KNAPP, A. BARBER, MRS. E. L. WILLIAMS, T. M. Eaton, J. M. Davidson, A. J. Smith, A. Hammond, John T. Judkins, Henry Gulick, Sr.; H. S. Whittaker, A. Barnett, J. N. Woodward, A. B. Stephens, John Nickson, J. N. Fawcett, Payne Brown, W. E. Montgomery, Monroe Johnson, A. Haines, M. L. Ward, Ella B. Ward, A. Keene, Fred Keene, E. K. Earle, H. F. Earle, Thomas Walker, A. G. White, W. J. Brower, P. B. Smith, F. B. Merriam, H. Hyatt, H. Stegeman, R. S. Harris, A. A. Gooden, G. A. Dukes, C. H. Rippey, Virginia Rippey, C. C. Jobes, J. L. Griffin, Tallie Spencer Sullivan, W. C. Kimball, J. C. Frisbie, S. W. Morgan, George Hannahs, F. B. Webb, John Haberfellner, W. S. Wilkins, S. W. Haines, Chula Vista School District, S. Healey, M. E. Phinney, D. L. Murdock, Dan. P. Stetzelberger, R. P. Middlebrook, Anson Titus, W. A. Henry, J. W. Preston, W. E. Ballinger, J. H. Blakeslee, Herman Banke, J. C. Alles, D. K. Adams, A. J. Morley, C. F. Wiggins, S. F. Dickinson, O. C. Noyes, J. E. Clouse, Peter Morse, E. W. Dyer, Parsons Shaw, A. C. Crockett, E. E. Flanders, Elisha M. Gavin, Stephen Sheffield, C. A. Whittemore, F. Gardner, Charles Monnike, Carl Reinisch, David K. Horton, George Henninger, J. M. Cook, O. H. P. Forker, I. N. Lamson, George D. Hayes, A. A. Groat, R. H. Longshare, J. G. Shaw, Julian Field, C. E. Foss, Otto Sollner,

A. B. Story, L. E. Allen, C. F. Chadwick, A. R. Schulenburg, James W. Jackson, John H. Ferry, Frank W. Hedges, A. V. Bills, C. L. Barber, A. J. Stokes, T. E. Walker, A. J. Grainger, E. P. Hammack, Wah Hong, Edward Gulick and William Gulick and Henry Gulick, Partners, Doing Business under the Firm Name of Gulick Brothers; John J. Jones, Wm. D. Webber, W. F. Stearns, W. J. Henderson, P. W. Morse, O. Darling, S. J. Bradt, R. W. Vaughan, E. J. Elliott, M. E. Jennings Verity, J. E. Stephens, 148 R. G. Wallace, George H. Hancock, Frank Howe, I. N. Morse, Emil O. Hoeh, C. S. Johnson, J. H. Clough, George L. Henderson, M. Cox, John Johnson, A. T. Burr, A. M. Jameson, H. E. Klammer, J. H. Dean, P. S. Leisenring, J. M. Johnson, Ah Quinn, Ah Lit, J. M. Ballou, S. H. Dale, George M. Tutton, E. P. Lounsbury, George W. De Tar, S. D. Foss, Austin Carey, George J. Jecock, D. S. McBean, Quincy A. Petts, F. O. Reinhart, H. I. Atwater, E. H. Woods, N. H. Downs, Edwin S. Belcher, W. G. Terril, T. G. Ellis, W. M. Carr, D. F. Garrettson and Elisabeth A. Garrettson, Executors of the Estate of G. A. Garrettson, Deceased; George M. Darnell, Flora B. Arndt, J. W. Stearns, P. W. Beck, M. G. Miller, J. F. Morrill, Fred W. Pearson, Sunnyside School District, N. J. Pillsbury, Julia Latta, Mary R. Klammer, Thomas Lindsay, E. P. Carr, I. M. Howe and H. B. Howe, Partners, Doing Business under the Firm Name of Howe Brothers; Arthur Ryan and Michael Mack, Partners, Doing Business under the Firm Name of Ryan and Mack; James H. Forbes, J. A. Pinkerton, S. D. Murdock, W. Weitekamp, John L. Davis, George H. Eaton, George Rippe, J. H. Greife, F. W. Reid, R. S. Harris, Sweetwater School District, L. W. Goff, George Dashbaugh, Henry Walker, C. C. Hughes, Frank A. Kimball, Henry Haberfellner, F. Mederle, L. C. Wright, Cyrus Johnson, A. W. Howard, Laura F. Meyer, George F. McMurry, F. H. Downes, N. W. Downes, Morton Penfield, J. A. Thomas, J. O. Reinhart, William Doyle, Complainants,

vs.

SAN DIEGO LAND & TOWN COMPANY OF MAINE, Defendant.

The demurrer of the defendant to the bill of complaint of the plaintiffs in the above-entitled cause having been submitted to the court and sustained, and the plaintiffs having elected to stand on their bill, and declining to amend the same as allowed by the court, judgment and decree is now rendered in favor of the defendant on said demurrer.

It is therefore considered and decreed by the court that the plaintiffs take nothing by their bill herein; that said bill be, and the same is hereby, dismissed, and that the defendant have and 149 recover of and from the plaintiffs its costs in this behalf laid out and expended, taxed at \$20.50.

ROSS,  
Circuit Judge.

December 5th, 1898.

Decree entered and recorded December 5th, 1898.

WM. M. VAN DYKE, *Clerk.*

(Endorsed :) No. 839. U. S. circuit court, ninth circuit, southern district of California. H. C. Osborne *et al.*, complainants, *vs.* San Diego Land & Town Company of Maine, def't. Decree of dismissal. Filed Dec. 5, 1898. Wm. M. Van Dyke, clerk. Works & Lee, rooms 420 to 425, Henne building, Los Angeles, Cal., solicitors for defendant.

150 Whereupon said bill of review, notice of motion to strike bill from files, and affidavit of John E. Boal, affidavit of Monroe Johnson, copy of order denying motion to strike bill from files, demurrer, copy of order sustaining demurrer, and said final decree are hereto annexed, said final decree being duly signed, filed, and enrolled pursuant to the practice of said circuit court.

Attest, etc.,

[SEAL.]

WM. M. VAN DYKE, *Clerk.*

(Endorsed :) No. 839. In the circuit court of the United States, ninth judicial circuit, for the southern district of California. H. C. Osborne *et al.* *vs.* San Diego Land & Town Company of Maine. Enrolled papers. Filed December 5th, 1898. Wm. M. Van Dyke, clerk. Recorded, Decree Register Book No. 2, page 317.

151 In the Circuit Court of the United States, Ninth Circuit, Southern District of California.

H. C. OSBORN ET AL., Complainant,

*vs.*

SAN DIEGO LAND & TOWN COMPANY OF MAINE,  
Defendant.

} Bond for Costs.

Know all men by these presents that A. G. Gassen, R. A. Thomas, V. E. Shaw, of the county of San Diego, State of California, are held and firmly bound unto the San Diego Land & Town Company of Maine in the sum of \$250, lawful money of the United States, to be paid to the said San Diego Land & Town Company of Maine, its successors or assigns; and — which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Scaled with our seals and dated this 11th day of August, in the year one thousand eight hundred and ninety-eight.

Whereas the said complainants in said cause are about to file in said circuit court their bill of review for alleged errors apparent in the decree entered in said court in the cause entitled "San Diego Land & Town Company of Maine, substituted as complainant in the place of Chas. D. Launing, receiver of the San Diego Land & Town Company of Kansas, complainant, *vs.* H. C. Osborn *et al.*, defendants, No. 671," which said decree was made and entered on the 12th day of February, 1898:



Now, therefore, the condition of this obligation is such that if the complainants named in said bill of review shall diligently prosecute the same and shall pay all costs and damages that may be awarded against them as said complainants, then this obligation to be void; otherwise to remain in full force and effect.

152

A. G. GASSEN.

R. A. THOMAS.

V. E. SHAW.

Scaled and delivered in the presence of—

Witness:

A. HAINES.

Witness:

A. HAINES.

Witness:

A. HAINES.

STATE OF CALIFORNIA, }  
County of San Diego, } ss :

A. G. Gassen and R. A. Thomas, V. E. Shaw, being severally sworn, depose and say, each for himself:

That he is a resident of the county of San Diego, State of California, and a householder and freholder in said county, and that he is worth the sum of \$500 over and above all exemptions and all just debts and responsibilities.

A. G. GASSEN.

R. A. THOMAS.

V. E. SHAW.

Witness:

A. HAINES.

Witness:

A. HAINES.

Witness:

A. HAINES.

Subscribed and sworn to before me this 11th day of August, 1898, by A. G. Gassen and V. E. Shaw.

[SEAL.]

M. L. WARD,

*Notary Public in and for San Diego County,  
State of California.*

(10c. int. rev. st'p.)

(Endorsed :) No. 839. Circuit court of the United States, ninth circuit, southern district of California. H. C. Osborn *et al.*, complainants, vs. San Diego Land & Town Company of Maine, defendants. Bond for costs. Filed Aug. 12, 1898. Wm. M. Van Dyke, clerk, by E. H. Owen, deputy.

153 At a stated term, to wit, the August term, A. D. 1898, of the circuit court of the United States of America of the ninth judicial circuit in and for the southern district of California, held

at the court-room, in the city of Los Angeles, on Monday, the fifth day of December, in the year of our Lord one thousand eight hundred and ninety-eight.

Present: The Honorable Erskine M. Ross, circuit judge.

H. C. OSBORNE ET AL., Complainants,	} No. 839.
vs.	
SAN DIEGO LAND & TOWN COMPANY OF MAINE, Defendant.	

Now come complainants in this suit, by A. Haines, Esq., their counsel, and in open court elect to stand on their bill of complaint, and decline to amend their said bill of complaint as they were allowed to do by the order of the court entered November 28th, 1898; whereupon, on motion of John D. Works, Esq., of counsel for defendant, a decree is made and signed and directed to be entered herein dismissing complainants' said bill of complaint.

154 In the Circuit Court of the United States, Ninth Circuit,  
Southern District of California.

No. 839.

H. C. OSBORNE, WILLIAM KNAPP, A. BARBER, MRS. E. L. WILLIAMS, T. M. Eaton, J. M. Davidson, A. J. Smith, A. Hammond, John T. Judkins, Henry Gulick, Sr., H. S. Whittaker, A. Barnett, J. N. Woodward, A. B. Stephens, John Nickson, J. H. Faucett, Payne Brown, W. E. Montgomery, Monroe Johnson, A. Haines, M. L. Ward, Ella B. Ward, A. Keene, Fred Keene, E. K. Earle, H. F. Earle, Thomas Walker, A. G. White, W. J. Brower, P. B. Smith, F. B. Merriam, H. Hyatt, H. Stegeman, R. S. Harris, A. A. Gooden, G. A. Dukes, C. H. Rippey, Virginia Rippey, C. C. Jobes, J. L. Griffin, Tallie Spencer Sullivan, W. C. Kimball, J. C. Frisbie, S. W. Morgan, George Hannahs, F. B. Webb, John Haberfelner, W. S. Wilkins, S. W. Haines, Chula Vista School District, S. Healey, M. E. Phinney, D. L. Murdock, Dan. P. Stetzelberger, R. P. Middlebrook, Anson Titus, W. A. Henry, J. W. Preston, W. E. Ballinger, J. H. Blakeslee, Herman Banke, J. C. Alles, D. K. Adams, A. J. Morley, C. F. Wiggins, S. F. Dickinson, O. C. Noyes, J. E. Clouse, Peter Morse, E. W. Dyer, Parsons Shaw, A. C. Crockett, E. E. Flanders, Elisha M. Gavin, Stephen Sheffield, C. A. Whittenmore, F. Gardner, Charles Monnike, Carl Reinisch, David K. Horton, George Henniger, J. M. Cook, O. H. P. Forker, I. N. Lamson, George D. Hayes, A. A. Groat, R. H. Longshare, J. G. Shaw, Julian Field, C. E. Foss, Otto Sollner, A. B. Story, L. E. Allen, C. F. Chadwick, A. R. Schulenburg, James W. Jackson, John H. Ferry, Frank W. Hedges, A. V. Bills, C. L. Barber, A. J. Stokes, T. E. Walker, A. J. Grainger, E. P. Hammack, Wah Hong, Edward Gulick and William Gulick and Henry Gulick, Partners, Doing Business under the Firm Name of Gulick Brothers; John J. Jones, Wm. D. Webber, W. F. Stearns, W. J. Henderson, P. W. Morse, O. Darling, S. J. Bradt, R. W.

155 Vaughan, E. J. Elliott, M. E. Jennings Verity, J. E. Stephens, R. G. Wallace, George H. Hancock, Frank Howe, I. N. Morse, Emil O. Hoeh, C. S. Johnson, J. H. Clough, George L. Henderson, M. Cox, John Johnson, A. T. Burr, A. M. Jameson, H. E. Klammer, J. H. Dean, P. S. Leisenring, J. M. Johnson, Ah Quinn, Ah Lit, J. M. Ballou, S. H. Dale, George M. Tutton, E. P. Lounsbury, George W. De Tar, S. D. Foss, Austin Carey, George J. Jecock, D. S. McBean, Quincy A. Petts, Morton Penfield, J. A. Thomas, J. O. Reinhart, William Doyle, F. O. Reinhardt, H. I. Atwater, E. H. Woods, N. H. Downs, Edwin S. Belcher, W. G. Terril, T. G. Ellis, W. M. Carr, D. F. Garrettson and Elizabeth A. Garrettson, Executors of the Estate of G. A. Garrettson, Deceased; George M. Darnell, Flora B. Arnott, J. W. Stearns, P. W. Beck, M. G. Miller, J. F. Morrill, Fred W. Pearson, Sunny-side School District, N. J. Pillsbury, Julia Latta, Mary R. Klammer, Thomas Lindsay, E. P. Carr, I. M. Howe and H. B. Howe, Partners, Doing Business under the Firm Name of Howe Brothers; Arthur Ryan and Michael Mack, Partners, Doing Business under the Firm Name of Ryan and Mack; James H. Forbes, J. A. Pinkerton, S. D. Murdock, W. Weitekamp, John L. Davis, George H. Eaton, George Rippe, J. H. Freife, F. W. Reid, R. S. Harris, Sweetwater School District, L. W. Goff, George Dashbaugh, Henry Walker, C. C. Hughes, Frank A. Kimball, Henry Habermellner, F. Mederle, L. C. Wright, Cyrus Johnson, A. W. Howard, Laura F. Meyer, George F. McMurry, F. H. Downes, N. W. Downes, Complainants,

vs.

SAN DIEGO LAND & TOWN COMPANY OF MAINE, Defendant.

*Petition on Appeal.*

The above-named complainants, conceiving themselves aggrieved by the decree made and entered on the 5th day of December, 1898, in the above-entitled cause, do hereby appeal from said order and decree to the Supreme Court of the United States for the  
 156 reasons specified in the assignment of errors, which is filed herewith, and they pray that this their appeal may be allowed, and that a transcript of the record, proceedings, and papers upon which said order and decree were made, duly authenticated, may be sent to the Supreme Court of the United States.

A. HAINES,  
 M. L. WARD,  
 C. H. RIPPEY,

*Solicitors for Complainants and Appellants.*

Dated Dec. 5th, 1898.

San Diego, Cal., 4th and "D" streets.

The foregoing claim of appeal is hereby allowed in open court at this August term, 1898, in which said decree has been entered.

Dated December 5, 1898.

ROSS,  
*Circuit Judge.*

157 In the Circuit Court of the United States, Ninth Circuit,  
Southern District of California.

No. 839.

H. C. OSBORNE, WILLIAM KNAPP, A. BARBER, MRS. E. L. WILLIAMS,  
T. M. Eaton, J. M. Davidson, A. J. Smith, A. Hammond, John T.  
Julkins, Henry Gulick, Sr., H. S. Whittaker, A. Barnett, J. N.  
Woodward, A. B. Stephens, John Nickson, J. H. Faucett, Payne  
Brown, W. E. Montgomery, Monroe Johnson, A. Haines, M. L.  
Ward, Ella E. Ward, A. Keene, Fred Keene, E. K. Earle, H. F.  
Earle, Thomas Walker, A. G. White, W. J. Brower, P. B. Smith,  
F. B. Merriam, H. Hyatt, H. Stegeman, R. S. Harris, A. A. Gooden,  
G. A. Dukes, C. H. Rippey, Virginia Rippey, C. C. Jobes, J. L.  
Griffin, Tallie Spencer Sullivan, W. C. Kimball, J. C. Frisbie,  
S. W. Morgan, George Hannahs, F. B. Webb, John Haberfellner,  
W. S. Wilkins, S. W. Haines, Chula Vista School District, S.  
Healey, M. E. Phinney, D. L. Murdock, Dan. P. Stetzelberger,  
R. P. Middlebrook, Anson Titus, W. A. Henry, J. W. Preston,  
W. E. Ballinger, J. H. Blakeslee, Herman Banke, J. C. Alles,  
D. K. Adams, A. J. Morley, C. F. Wiggins, S. F. Dickinson, O. C.  
Noyes, J. E. Clouse, Peter Morse, E. W. Dyer, Parsons Shaw,  
A. C. Crockett, E. E. Flanders, Elisha M. Gavin, Stephen Shef-  
field, C. A. Whittemore, F. Gardner, Charles Monnike, Carl Rein-  
isch, David K. Horton, George Henniger, J. M. Cook, O. H. P.  
Forker, I. N. Lamson, George D. Hayes, A. A. Groat, R. H. Long-  
share, J. G. Shaw, Julian Field, C. E. Foss, Otto Sollner, A. B.  
Story, L. E. Allen, C. F. Chadwick, A. R. Schulenburg, James W.  
Jackson, John H. Ferry, Frank W. Hedges, A. V. Bills, C. L. Barber,  
A. J. Stokes, T. E. Walker, A. J. Grainger, E. P. Hammack, Wah  
Hong, Edward Gulick and William Gulick and Henry Gulick, Part-  
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John J. Jones, Wm. D. Webber, W. F. Stearns, W. J. Henderson,  
P. W. Morse, O. Darling, S. J. Bradt, R. W. Vaughan, E. J.  
Elliott, M. E. Jennings Verity, J. E. Stephens, R. G. Wallace,  
158 George H. Hancock, Frank Howe, I. N. Morse, Emil O. Hoch,  
C. S. Johnson, J. H. Clough, George L. Henderson, M. Cox,  
John Johnson, A. T. Burr, A. M. Jameson, H. E. Klammer, J. H.  
Dean, P. S. Leisenring, J. M. Johnson, Ah Quinn, Ah Lit, J. M.  
Ballou, S. H. Dale, George M. Tutton, E. P. Lounsbury, George  
W. De Tar, S. H. Foss, Austin Carey, George J. Jecock, D. S. Mc-  
Bean, Quincy A. Petts, Morton Penfield, J. A. Thomas, J. O. Rein-  
hart, William Doyle, F. O. Reinhardt, H. I. Atwater, E. H. Woods,  
N. H. Downs, Edwin S. Belcher, W. G. Terril, T. G. Ellis, W. M.  
Carr, D. F. Garrettson and Elizabeth A. Garrettson, Executors of  
the Estate of G. A. Garrettson, Deceased; George M. Darnell,  
Flora B. Arndt, J. W. Stearns, P. W. Beck, M. G. Miller, J. F.  
Morrill, Fred W. Pearson, Sunnyside School District, N. J. Pills-  
bury, Julia Latta, Mary R. Klammer, Thomas Lindsay, E. P. Carr,  
I. M. Howe and H. B. Howe, Partners, Doing Business under the  
Firm Name of Howe Brothers; Arthur Ryan and Michael Mack,

Partners, Doing Business under the Firm Name of Ryan and Mack ; James H. Forbes, J. A. Pinkerton, S. D. Murdock, W. Weitekamp, John L. Davis, George H. Eaton, George Rippe, J. H. Greife, F. W. Reid, R. S. Harris, Sweetwater School District, L. W. Goff, George Dashbaugh, Henry Walker, C. C. Hughes, Frank A. Kimball, Henry Haberfellner, F. Mederle, L. C. Wright, Cyrus Johnson, A. W. Howard, Laura F. Meyer, George F. McMurry, F. H. Downes, N. W. Downes, Complainants,

vs.

SAN DIEGO LAND & TOWN COMPANY OF MAINE, Defendant.

*Assignments of Error.*

And now, on the 5th day of December, 1898, came all the complainants to said action, by A. Haines, M. L. Ward, and C. H. Rippey, their solicitors, and say that in the decree, record, and proceedings in the above-entitled cause there is manifest error, in this, to wit :

159 First. Because the court sustained the first assignment of the demurrer to the said bill of review.

Second. Because the court sustained the second assignment of the demurrer to the said bill of review.

Third. Because the court sustained the third assignment of the demurrer to said bill of review.

Fourth. Because the court sustained the fourth assignment of the demurrer to said bill of review.

Fifth. Because the court, by its ruling upon said demurrer and its decree herein, overruled the first assignment of error set forth in said bill of review.

And thereby erroneously ruled and adjudged that the exceptions filed September 22, 1897, in said original cause, to the further and supplemental answer filed Sept. 13, 1897, raised for decision the merits of the defenses set forth in the answer ; that said exceptions were properly sustained, and that said further answer and supplemental answer was properly expunged from the record, and was properly not to be considered on the final hearing of said cause, and that said cause was properly not set down for hearing on bill and answer, or tried on issues joined and proofs made.

Sixth. Because the court, by its ruling upon said demurrer and by its decree herein, overruled the second assignment of error set forth in said bill of review.

And thereby erroneously ruled and adjudged that the court in said original cause properly ruled and held upon the first exception to said answer, among other things erroneous, the following, to wit :

That all of the allegations of said further answer and supplemental answer setting forth that the waters and water system of the San Diego Land & Town Company of Kansas were its private property were immaterial, irrelevant, and impertinent.

And that all the allegations of said answer setting forth that  
160 said corporation, by the contracts, agreements, conveyances, transfers, acts, representations, classifications, and admissions

made by it and made under the circumstances, all as in the answer set forth, did grant to and vest in your orators and did recognize and acknowledge their water rights and freehold easements of the flow and use of water from said water system as appurtenant to lands owned respectively by your orators and as constituting corresponding freehold servitudes on said company's water system were immaterial, irrelevant, and impertinent, and that they were so in virtue of the constitution and laws of the State of California.

And that all the allegations of said answer setting forth that all claims and demands of said company for the price or compensation for said water rights, easements, and servitudes had been paid or otherwise satisfied were immaterial, irrelevant, and impertinent, and that all such freehold water rights, easements, and servitudes were void and in conflict with the constitution and laws of said State.

And that all the allegations of said answer setting forth the representations, agreements, and contracts, made by said corporation of Kansas to and with each of your orators, fixing the water rate for irrigation of their lands under their respective water rights, easements, and servitudes at the rate of \$3.50 per acre per annum were irrelevant, immaterial, and impertinent, and that any such contracts or agreements are in conflict with the constitution and laws of the State of California and void, and that all such allegations of the contractual fixing of water rates in connection with all such allegations of water rights, easements, and servitudes were altogether impertinent in defense to the demand of said corporation and its said receiver to increase without the consent of your orators the rate of \$3.50 per acre per annum for irrigation of their lands to \$7 per acre per annum.

161 And that all the allegations of said answer setting forth that the rate of \$3.50 per acre per annum for irrigation of the lands of your appellants was the only rate which had ever been actually established and collected by said corporation were immaterial, irrelevant, and impertinent.

And that the allegations that your appellants were induced to purchase, improve, and settle upon their respective tracts of land in reliance upon said established rate of \$3.50 per acre were immaterial, irrelevant, and impertinent.

And that the allegations that your appellants had for more than five years held and enjoyed the use of said water upon their land for irrigation purposes at said annual rate of \$3.50 per acre, and that the right to have and enjoy the use of said water at said rate became vested in your appellants respectively by operation of the statute of limitations of the State of California, were immaterial, irrelevant, and impertinent.

And that all the allegations of said answer setting forth the total irrigating capacity of said water system and the proportion of the same not used and all the other facts and circumstances pertaining to the reasonableness of said increase of rate set forth in said answer were irrelevant, immaterial, and impertinent to be answered to such demanded increase.

And that the denial that said corporation was entitled to demand from your appellants water rentals beyond \$3.50 per acre per annum to apply upon the demanded net income of six per cent. per annum was immaterial, irrelevant, and impertinent.

And that the denial that the compensation to said corporation for either of your appellant's respective water rights, easements, and servitudes was or still is subject to regulation by any board of supervisors of said State, as provided in said act of 1885, was irrelevant, immaterial, and impertinent.

And that the denial that at the said rate of \$3.50 per acre per annum for irrigation, together with rates for domestic use, if water should be demanded and used upon the whole of the land which the  
162 said system is able to supply with water, said company would not be able to pay its operating expenses and maintain from such rentals its plant and system, and the denial that by reason of said established rate said company was losing money, and the denial that the plant of said company is going to decay, without sufficient resources from said rate for replacing the same, and that the denial that said company at said rate of \$3.50 will be compelled to furnish water to consumers at any loss, or that, if said rate of \$3.50 is maintained, said system will be lost, are immaterial, irrelevant, and impertinent.

And that the allegations of the requirement as a condition to the refraining by said company and its receiver from shutting off the supply of water to each of your orators under their respective water rights and easements, that your orators should subscribe and execute the agreement, designated "Application for water," set forth in the answer, *was* immaterial, irrelevant, and impertinent.

And that the denial that any increase of the said rate of \$3.50 is at all necessary to enable said corporation or its receiver to maintain and operate said water plant and pay the expenses of the maintenance and operation thereof is irrelevant, immaterial, and impertinent.

That the allegations relating to the amount in controversy as to each of your orators and as affecting the jurisdiction are irrelevant, immaterial, and impertinent.

And that the allegations of the answer which rely upon and invoke the application of the provisions of section one of article XIV and of article V of the amendments to the Constitution of the United States, and which rely upon and invoke the application of section one of article I and of section nine of article XX of the constitution of California, and which rely upon and invoke section

11½ of the amendment of the act of March 12, 1885, of the  
163 State of California, set forth in said answer, and each of them, are immaterial, irrelevant, and impertinent.

Seventh. Because the court, by its ruling upon said demurrer and by its decree herein, overruled the third assignment of error set forth in said bill of review.

And thereby erroneously ruled that the court properly ruled in the original cause, upon exception second to the answer, that the said answer was evasive and uncertain in that it did not show which



of the defendants to said original cause acquired their water rights from the San Diego Land & Town Company of Kansas by purchase and how much they paid therefor to said company, although the bill of complaint in said original action alleges that each of the defendants thereto was the owner of a water right by purchase or otherwise, and alleges no distinction or discrimination between such rights, whether acquired by purchase or otherwise, and calls for no answer as to which became owners of such rights by purchase or which became owners otherwise, and although said answer shows that the water rights, easements, and servitudes, however acquired, are each in freehold, that each was created by said corporation of Kansas, and that compensation for each has been paid, or that satisfaction has otherwise been made to said corporation for the same.

Eighth. Because the court, by its ruling upon said demurrer and by its decree herein, overruled the fourth assignment of error set forth in said bill of review.

And thereby erroneously ruled and adjudged that the court in the original cause correctly sustained the third exception to the said answer, and erroneously reaffirmed the ruling on said exception that it is admitted by said answer that the actual and just cost of the water works and system of the said San Diego Land & Town Company of Kansas is \$750,000, and erroneously reaffirmed the ruling on said exception that it affirmatively appears from said answer that the annual rental of \$7 per acre will not and cannot realize to the San Diego Land & Town Company of Maine six per cent. net increase per annum on its investment.

164 And erroneously reaffirmed the ruling on said exception that the law of the State of California allows said company as against these appellants, defendants to the original bill, as a reasonable return on their investment, not less than six nor more than eighteen per cent. net on the value of said plant and system without regard to the water rights, easements, and servitudes acquired by each of said defendants from said San Diego Land & Town Company of Kansas, and owned by them respectively as set forth in the said answer, and without regard to the agreements of said company with your orators as to the annual rate of \$3.50 per acre per annum, and without regard to the rate of \$3.50 per acre per annum established by said corporation at the time when said water rights, easements, and servitudes respectively rested in said defendants, and ever since collected, all as set forth in said answer.

Ninth. Because the court, by its ruling upon said demurrer and by its said decree, overruled the fifth assignment of error set forth in said bill of review.

Whereby it erroneously reaffirmed the former ruling sustaining the fourth exception to said answer that said exception was sufficient in form to point out to and inform the defendant what matters in said original bill were not well or sufficiently answered or respecting which the denials or averments of the said answer are evasive, imperfect, or insufficient.

And whereby it erroneously reaffirmed that the denials, admis-

sious, or averments in said answer are evasive, imperfect, and insufficient.

Tenth. Because the court, by its ruling upon said demurrer and by said decree, overruled the sixth assignment of error set forth in said bill of review.

Whereby it erroneously reaffirmed its ruling sustaining the exception numbered fifth to the answer that the question whether it appears from the answer of the defendants that the complainant receiver has legally established and is entitled to collect the water rental of \$7 per acre per annum for the irrigation of the lands of each of the defendants respectively, is properly triable upon exception to the answer.

And whereby it erroneously reaffirms its ruling that it appears affirmatively or otherwise from said answer that said corporation of Kansas and the said receiver, complainant, had or has legally established and is entitled to collect a water rental of \$7 per acre per annum for the irrigation of the lands of the defendants or any of them.

And whereby it erroneously reaffirms its ruling that the said defendants had no standing in said court to contest the reasonableness of the rate of \$7 per acre per annum demanded by the complainant to such original bill, but that their remedy, if any they had, was to apply to the board of supervisors of the county in which their said land is situated to fix and establish the rates to be paid for such water.

And whereby it erroneously reaffirms its ruling in so construing and applying to this cause the statute of California approved March 12th, 1885, referred to in the original bill of complaint, as that said statute operated and operates to deprive each of said defendants of his, her, and its water rights, easements, and servitudes, and of the right to enjoy the same at the rate of \$3.50 per acre per annum, actually established and collected by said corporation and as established by the contracts, all as in said answer set forth and all without due process of law, and to deprive said defendants of their liberty to contract for their said water rights, easements, and servitudes without due process of law, and to deny to each of said defendants the equal protection of the laws, all in contravention of section one, article XIV, of the amendments to the Constitution of the United States and article V of the amendments to the Constitution of the United States, and erroneously rules that said statute so construed is not in conflict with article I, section one, of the constitution of the State of California and is not in conflict with section nine (9), article twenty (20), of the constitution of the State of California.

Eleventh. Because the court, by its ruling upon said demurrer and by its decree, overruled the seventh assignment of error set forth in said bill of review.

And thereby erroneously reaffirms its ruling on the sixth exception to the said answer; that such exception did properly raise and present the question whether said answer shows on its face that complainant is legally or equitably entitled to collect the rate of \$7

per acre for irrigation of the lands of said defendants and whether said raised rate was reasonable and just.

And erroneously reaffirms its ruling that the facts set forth in said answer sustain the charge set forth in said sixth exception.

Twelfth. Because the court, by its ruling upon said demurrer and by its decree, overruled the eighth assignment of error set forth in said bill of review.

Whereby it erroneously ruled that the order made and entered December 6, 1897, in said original cause substituting the San Diego Land & Town Company of Maine, as complainant, in place of the original complainant, Charles D. Lanning, receiver of the San Diego Land & Town Company of Kansas, was not irregular nor in disregard of rule 57 of the rules of practice for the courts of equity of the United States; and further erroneously overruled and disallowed the showing of error that by virtue of said order of substitution the said defendants to said original bill were denied opportunity to demur, plead, or answer to any supplemental bill setting forth any alleged interest in said cause of the San Diego Land & Town Company of Maine.

Thirteenth. Because the court, by its ruling upon said demurrer and by its decree, overruled the ninth assignment of error set forth in the bill of review.

167      Whereby the court erroneously reaffirmed its order, entered in said cause January 3, 1898, that the original bill of complaint be taken *pro confesso* against said defendants for want of an answer, for that, notwithstanding the sustaining of the exceptions for immateriality, irrelevancy, and impertinence to all those parts of the answer set forth in exception numbered first and the expunging the same, the admissions, denials, and averments in the answer not excepted to raised material issues in said cause; that such remaining admissions, denials, and averments of said answer show in substance that said San Diego Land & Town Company of Kansas was the owner of a water system and franchise, as set forth in its articles of incorporation, shown in the answer; that said corporation completed its said system in Feb., 1888; that how much money said company expended up to January 1, 1896, in acquiring and constructing said system the defendants had no knowledge, information, nor belief.

That the right and title of said company to its said water system is subject to the rights of the defendants respectively as follows: That each defendant owning land, as alleged in the complaint, has become the owner of a water right and a part of the water appropriated and stored by said company necessary to irrigate his and her land; that such water rights extend not only to the irrigation of the defendants' respective tracts of land, but also to supplying the needs of the persons resident and animals kept thereon respectively.

That each said water right embraces the right and easement of the service of the reservoir and distributing system of said corporation for the delivery of water at and upon said respective tracts of land for all uses by automatic gravity pressure existing under

said system and including the right to have said corporation maintain said system efficiently to conduct the water to and deliver the same on the premises of each of the defendants for irrigation and other uses at and for the annual rates to be deemed  
168 and accepted as the legally established rates therefor.

That at the times mentioned in the bill of complaint said company was furnishing the defendants and each of them with water through its said system; that said company has at all times treated its lands under irrigation from said system as being on precisely the same footing as to annual rates with the lands of each of the defendants and has entered upon its books the same rate per acre per annum chargeable to its own lands as that charged to the lands of defendants; that said receiver has done likewise.

That the annual expense of said corporation to operate and maintain its water system does not exceed the sum of \$12,034.99.

That said company commenced to furnish water to consumers regularly in February, 1888; that in said month of February, 1888, it fixed and established and has since charged the rate of \$3.50 per acre as the annual rate for irrigation and no more until January 1, 1896.

That in order to pay the company the amount of its expenses and an annual income of 6 per cent. upon the whole present cost and present value of its water system it is not necessary that the rates for water sold and consumed should exceed the sum of \$32,000 per annum; that the present cost and the present cash value of the property constituting said water system does not exceed the sum of \$300,000, and that not over one-half of the capacity of said system was on January 1, 1896, in use.

And that not over two-thirds of the capacity of said system was in use when said answer was filed.

That in order to pay the cost of operating the plant of said company and maintain the same and pay said company as much as 6 per cent. net annual revenue upon the present cost and cash value of its plant and water system it is not and will not be necessary to charge a rate per annum of not less than \$7 for irrigation  
169 purposes or any sum in excess of \$3.50 per acre per annum for irrigation purposes in connection with the rate for water for domestic use under said system actually established and collected.

That no petition has ever been presented to the board of supervisors of the county in which said system is situated for the fixing of water rates thereunder.

That said land & town company and the complainant receiver gave notice that on January 1, 1896, they would undertake to establish a rental of \$7 per acre per annum for water supplied to the respective lands of defendants.

That at the date of said notice the defendants were and for a long time prior thereto had been in the continued enjoyment of their said water rights and easements to the flow of the water thereunder, and were paying and always had paid to said company \$3.50 per acre per annum for each acre irrigated by each of them.

That each of the defendants refused to pay said rate of \$7 per acre per annum; the admission that the defendants do maintain that neither the said land & town company nor said receiver has any legal or equitable right to fix the amount to be paid by any of them for such water for irrigation, and that the rate of \$3.50 per acre per annum actually established by said land & town company by the contracts, conveyances, use, and practice as set forth in the answer, and which rate has at all times since the inauguration of said water system been collected and paid for the use of said water, must be and remain and of right ought to be and remain the established rate to be paid by these defendants for such use as against the said attempt of said company and the complainant to raise the same to \$7 per acre per annum.

That article XIV of the constitution of the State of California and of the legislative act of the said State of March 12, 1885, included the provision that until water rates should be established by the board of supervisors or after they should have been abrogated by such board, as in the said act provided, the actual rates established and collected by each \* \* \* corporation then furnishing or that should thereafter appropriate waters for sale, rental, or distribution to the inhabitants of any county of said State should be deemed and accepted as the legally established rates thereof.

The admission that in order to enforce the payment of said proposed rental of \$7 per acre per annum the complainant caused the water to be shut off from the premises of each of the defendants until such demanded rental should be paid.

The admission that the proposed increase of rates, if collected from all lands irrigated under said system, including those of said corporation, would increase the rentals collected by the company to not less than \$14,000 per annum.

The admission that the complainant Lanning was appointed receiver, as alleged in the bill of complaint.

That all said matters and other matters in said answer not excepted to, taken together with the allegations of the bill of complaint, raised material issues in said cause.

And appellants say that by said erroneous reaffirmance of said order for taking said bill of complaint *pro confesso* each of the defendants was deprived of a hearing upon the merits of said unexpunged portions of the answer and the issues made thereby.

Fourteenth. Because the court by its ruling upon said demurrer and by its decree herein overruled the 10th assignment of error set forth in the bill of review.

Whereby the court erroneously reaffirmed its decision that the allegations of the original bill of complaint warranted the decree entered *pro confesso* in favor of complainant.

Fifteenth. Because the court by its ruling upon said demurrer and by its decree herein overruled the 11th assignment of error set forth in the bill of review.

Whereby the court erroneously ruled and held herein that its decree in said original cause was not, upon the allegations of the

bill of complaint therein, against the statute law of the State of California entitled "An act to regulate and control the sale, rental, and distribution of appropriated water," &c., approved March 12, 1885, and as amended by the act of the legislature of said State approved March 2, 1897, in this, to wit:

That it appears on the face of said bill that the San Diego Land & Town Company of Kansas at the time when it commenced to furnish water to consumers, to wit, in the year 1887, established the annual rate of \$3.50 per acre for irrigation, and that said corporation and C. D. Lanning, as its receiver, from said date continually maintained and collected said rate and no more from all consumers and at no time collected any other rate, and that said rate at the time of filing said bill was and at the date of said decree remained the only actual rate established and collected by said corporation or its said receiver, and that it farther appears by the said bill that the board of supervisors of the county of San Diego mentioned in the complaint had not fixed or established rates of yearly rental at which said San Diego Land & Town Company should furnish water to consumers.

And that by the said statute law it was and is provided that until such rates should be so established by such board of supervisors the actual rates established and collected by every such corporation should be deemed and accepted as the legally established rate thereof, and that said statute law further provided and provides that every such corporation furnishing water to lands, as did said Kansas corporation to the defendants (the appellants), as alleged in said bill, shall furnish such waters at rates not exceeding the established rates as fixed and established by such

corporation as provided in said act, and that said statute provided and provides that every such company shall be obliged to furnish such water at the established rates regulated and fixed therefor as in said act provided to the extent of the actual supply of the waters of such corporation.

And that by said decree the appellants, defendants in said action, are deprived of the use of water from said system for irrigation at the rate actually established and collected by the San Diego Land & Town Company of Kansas at the time when said defendants respectively became owners of their water rights and at the only rates at any time actually established and collected by said corporation or its said receiver prior to and since said vesting of the said water rights, to wit, at the rate of \$3.50 per acre per annum.

Sixteen. Because the court by its ruling upon said demurrer and by its decree herein overruled the twelfth assignment of error set forth in the bill of review.

Whereby the court erroneously holds that the decree in said original cause, upon the allegations of the bill therein, is not against the right of these appellants, named as defendants to said bill, in that said bill of complaint shows upon its face that your orators are the owners respectively of tracts of land under the water system of said San Diego Land & Town Company of Kansas, and that your orators own and hold small tracts of land of only a few

acres each, and said bill further shows that each of your orators respectively had become and was the owner of a water right to such part of the water appropriated and stored by said company as is necessary to irrigate his tract of land, subject to such yearly rental as said company was entitled to charge.

And that it further appears on the face of said bill that the annual expense of operating and keeping in repair the reservoir and water system of said company and of furnishing all consumers under said system is, exclusive of interest on the bonds of said company, the sum of \$12,034.99.

173 And that it further appears from said bill that the annual income from water rates collected under said system was \$25,715.00, and in that it further appears from said bill that the rate actually established and collected by said company for furnishing water for irrigation of the lands of your orators and *his* codefendants named in said bill under their said water rights was \$3.50 per acre per annum, and that the proceeds of the same enters into the aggregate annual income of said water system.

And in that notwithstanding the said bill further shows that said company and the said C. D. Lanning, the receiver of said company, the complainant therein, gave notice to your orators, defendants to said bill, that from and after January 1, 1896, they would demand a rental of \$7.00 per acre per annum for water for irrigation, being twice the rate up to that time actually established and collected by said company or its receiver for furnishing your orators with such water, and notwithstanding that said bill further shows that because your orators and each of them refused to pay said rate of \$7.00 per acre, and maintained that neither said land & town company nor said C. D. Lanning, as receiver thereof, had any legal right to increase the amount of rental to be paid by them or any of them, and maintained that the rate of \$3.50 established and collected by the said land & town company must be and remain the established rate of rental, the said receiver, in order to enforce the payment of said increased rentals, caused the said water to be shut off from the premises of the defendants and each of them, and did deprive the appellants, defendants in said action, of the use and enjoyment of their said water rights upon payment of the rates of \$3.50 per acre per annum actually established and collected by said corporation and collected by said receiver.

Yet said rulings and decree upon the bill of review herein hold that said original decree does not erroneously hold, decide, and decree that said San Diego Land & Town Company of Kansas

174 and Charles D. Lanning, receiver thereof, had the right to increase the amount of the water rentals of said company for water furnished to the lands of said defendants from \$3.50 per acre per annum to the sum of \$7.00 per acre per annum without the consent of any of your appellants, and does not erroneously hold, decide, and decree that your appellants should be required to pay to the San Diego Land & Town Company of Maine said rate of \$7.00 per acre per annum for water furnished to their lands, as set forth in the said bill of complaint, from and after the first day



of January, 1896, until the fixing and establishing of such rates by the board of supervisors of San Diego county, California, or the re-establishment thereof in accordance with law as a condition upon which water should be furnished them from said water system, and does not erroneously hold, decide, and decree that the San Diego Land & Town Company of Maine is authorized to shut off the supply of water for irrigation of such lands of any of your appellants, the defendants to said bill, who should fail for five days to make such payment of arrears of said increase of water rate.

Whereby your appellants, the said defendants, are deprived of all benefit of the ownership of their water rights and, notwithstanding said ownership, are required as a condition to the enjoyment of their said easements to pay to said San Diego Land & Town Company of Maine an annual rate to yield, as appears by said bill, an excess over and above the actual cost of repairs, operation, and management of said water system as and for interest and net revenue upon the whole cost and value of said system and without regard to the servitudes thereon owned by your appellants.

Seventeen. Because the court by its ruling upon said demurrer and by its decree herein overruled the thirteenth assignment of error set forth in the bill of review herein.

Whereby the court erroneously reaffirmed its decree in said original cause and holds that said decree on its face and on the  
175 face of said original bill does not enforce legislation of the State of California, so construed as that it is in violation of sec. one (1) of article XIV of the amendments of the Constitution of the United States, in that the legislation, so construed and enforced, maintains the San Diego Land & Town Company of Kansas and C. D. Lanning, its receiver, in increasing the water rentals for water furnished to the lands of your appellants for irrigation of their respective lands from \$3.50 per acre per annum to \$7.00 per acre per annum for such irrigation without the consent of your appellants, and in that said legislation, so construed and enforced, justifies and maintains the said Kansas corporation and the said receiver and the San Diego Land & Town Company of Maine in having shut off the flow and use of the water under the water rights owned by the defendants to said bill from the lands of such defendants (the appellants), as shown in said bill, for refusal to pay such increase of rate, and in that said legislation, as so construed and enforced, requires said defendants to pay the San Diego Land & Town Company of Maine the rate of \$7.00 per acre per annum for water furnished their lands, as set forth in said bill of complaint, from and after January 1, 1896, as the condition upon which water shall be furnished them from said water system, and in that the legislation, so construed and applied, authorizes said last-named corporation to shut off the supply of water to any defendant who shall for five days fail to pay such increase of rate; by which means each of your orators is deprived of his, her, and its property without due process of law, and each is likewise deprived of the equal protection of the laws, and each is likewise without due process of law deprived of his, her, and its liberty to purchase or

otherwise acquire the water rights in the complaint referred to and is deprived of his, her, and its liberty to have the benefit of any acquisition, as in the complaint set forth, of such water rights.

And whereby it was erroneously held that said decree is  
176 not, for the reasons —, in contravention of article V of the amendments to the Constitution of the United States, as being an exercise of the judicial power of the United States, whereby your appellants are deprived of their property without due process of law, and whereby they are deprived, without due process of law, of their liberty to contract and acquire property.

Eighteen. Because the court by its ruling upon said demurrer and by its decree herein overruled the fourteenth assignment of error set forth in the bill of review herein.

Whereby the court erroneously held herein that it was not error apparent in said original decree, in that it was entered *pro confesso* and without proofs upon the allegations of the bill and without regard to the expunged portions of the answer and without regard to the portions of the answer expunged on said exceptions filed September 22, 1897, and because it ruled, in conformity to the opinion filed in said action Sept. 14, 1896, adopted by and referred to in said decree, that, notwithstanding the alleged fact that \$3.50 per acre per annum was the only rate for water supplied for irrigation that had been established and collected by said San Diego Land & Town Company of Kansas or said Charles D. Lanning, receiver, that said San Diego Land & Town Company and Charles D. Lanning, receiver, had the right to increase the amount of the water rentals of said company for water furnished to the lands of defendants (your appellants) from \$3.50 per acre per annum to the sum of \$7.00 per acre per annum for such irrigation, and that the contracts with respect to the rates of \$3.50 per acre per annum set forth in the answer were void as being in conflict with the constitution and laws of the State of California, and because it ruled that your orators had no right to be heard before the court on the questions of the reasonableness of the rates of \$7.00 per acre per annum, which the complainant in said action sought to enforce and which  
said decree enforces, and because it ruled that the defendants

177 to said bill of complaint (your appellants) were not entitled, upon the question of the rightfulness and lawfulness of the increase of the rate of \$3.50 per acre per annum to \$7.00 per acre per annum, to have any benefit of the ownership of their respective water rights as set forth in the bill of complaint or of their freehold easements and servitudes upon said company's water system as set forth in their answer, nor of the alleged fact that each had paid or made satisfaction to said San Diego Land & Town Company of Kansas for the price demanded by it for his, her, and its such water right, easement, and servitude.

That in point of law, among other things, said errors are, to wit:

1st. Said decree in said respects erroneously construes and applies the provisions of the constitution and laws of the State of California referred to in the bill of complaint and answer.

2nd. That said provisions of the constitution and laws as so con-

strued and applied by said decree are in contravention and repugnant to article XIV, sec. I, of the amendments to the Constitution of the United States, as depriving your appellants of their property without due process of law, and as depriving them of their liberty of contract without due process of law.

3d. That in applying the said provisions of the State constitution and statutes, as so construed by said decree and the opinion referred to therein, the judicial power of the United States was exercised in contravention of article V of the amendments to the Constitution of the United States and deprived the defendants in said action (your appellants) of their property without due process of law and of their liberty of contract without due process of law.

4th. And that the provisions of article XIV of the constitution of the State of California, as so construed, applied, and enforced by said decree, are in violation of the guarantee by section IV of article IV of the Constitution of the United States of a republican form of government to said State of California, in that by said provision of the constitution of said State as so construed, applied, and enforced the said State assumes the absolute control of all water appropriated and devoted to sale, rental, and distribution and the absolute control of all works devoted to the supplying or distribution of such waters; abolishes all capacity for the acquisition of private property rights, easements, or servitudes in such water supply and water works; abolishes all right to unite the ownership of any water supply from any such system with the ownership of lands for irrigation thereof by contract of purchase and payment or otherwise; abolishes all right or capacity for the acquisition of any water right, easement, or servitude in or upon any such water system by purchase or otherwise free from the perpetual obligation to pay net revenue, as the said statute now stands, of not less than six nor more than eighteen per cent. per annum upon the cost or value of such water system, and abolishes all right or capacity to ascertain, fix, and define by contract or convention the rate or compensation to be paid by any consumer for the supplying of any such waters for irrigation of land.

Nineteen. Because the court by its ruling upon said demurrer and by its decree herein overruled the fifteenth assignment of error set forth in the bill of review herein.

Whereby the court erroneously held herein that there was no error apparent in said original decree, in that said decree is made in favor of the San Diego Land & Town Company of Maine, although said corporation has not become a party to the record in said cause by supplemental bill or otherwise, and what interest, if any, said corporation hath or had in said action does not appear upon the record, nor was any claim on its part to any interest so set forth that the defendants to said bill of complaint, your orators, could in anywise make answer thereunto or plead thereunto.

Twenty. Because the court by its ruling upon said demurrer and decree herein overruled the sixteenth assignment of error in the bill of review herein.

Whereby the court erroneously held herein that there is no error

apparent in said original decree, in that this court was without jurisdiction to entertain said cause or to make any decree upon the merits therein.

Twenty-one. Because the court by its ruling upon said demurrer and decree herein overruled the seventeenth assignment of error in the bill of review herein.

Whereby it erroneously held herein that there is no error apparent in the said order of the court made on the third day of January, 1898, denying the motion of defendants in said cause to dismiss said suit and in retaining the jurisdiction thereof after the discharge of C. D. Lanning, receiver, the complainant therein, made by order of the court on the 6th day of December, 1897.

Wherefore the said defendants and appellants pray that the said decree of the said circuit court upon said bill of review be reversed, and that the said court may be directed to enter a decree in accordance with the prayer of said bill of review.

A. HAINES,  
M. L. WARD,  
C. H. RIPPEY,  
*Solicitors for Complainants.*

(Endorsed:) United States circuit court, ninth circuit, southern district of California. No. 839. In equity. *H. C. Osborn et al.*, complainants, *vs.* San Diego Land & Town Company of Maine, defendants. Petition on appeal and assignment of errors. Filed Dec. 5, 1898. Wm. M. Van Dyke, clerk. A. Haines, M. L. Ward, and C. H. Rippey, solicitors for complainants.

180 At a stated term, to wit, the August term, A. D. 1898, of the circuit court of the United States of America, of the ninth judicial circuit, in and for the southern district of California, held at the court-room, in the city of Los Angeles, on Monday, the fifth day of December, in the year of our Lord one thousand eight hundred and ninety-eight.

Present: The Honorable Erskine M. Ross, circuit judge.

No. 839.

H. C. OSBORNE, WILLIAM KNAPP, A. BARBER, MRS. E. L. WILLIAMS, T. M. Eaton, J. M. Davidson, A. J. Smith, A. Hammond, John T. Judkins, Henry Gulick, Sr., H. S. Whittaker, A. Barnett, J. N. Woodward, A. B. Stephens, John Nickson, J. H. Fawcett, Payne Brown, W. E. Montgomery, Monroe Johnson, A. Haines, M. L. Ward, Ella B. Ward, A. Keene, Fred Keene, E. K. Earle, H. F. Earle, Thomas Walker, A. G. White, W. J. Brower, P. B. Smith, F. B. Merriam, H. Hyatt, H. Stegeman, R. S. Harris, A. A. Gooden, G. A. Dukes, C. H. Rippey, Virginia Rippey, C. C. Jobes, J. L. Griffin, Tallie Spenser Sullivan, W. C. Kimball, J. C. Frisbie, S. W. Morgan, George Hannahs, F. B. Webb, John Haberfellner, W. S. Wilkins, S. W. Haines, Chula Vista School District, S. Healey, M. E. Phinney, D. L. Murdock, Dan. P. Stetzelberger, R. P. Middlebrook, Anson Titus, W. A. Henry, J. W. Preston, W. E. Ballinger, J. H. Blakeslee, Herman Banke, J. C. Alles, D. K. Adams, A. J. Morley, C. F. Wiggins, S. F. Dickinson, O. C.

Noyes, J. E. Clouse, Peter Morse, E. W. Dyer, Parsons Shaw, A. C. Crockett, E. E. Flanders, Elisha M. Gavin, Stephen Sheffield, C. A. Whittlemore, F. Gardner, Charles Monnike, Carl Reinisch, David K. Horton, George Henninger, J. M. Cook, O. H. P. Forker, I. N. Lamson, George D. Hayes, A. A. Groat, R. H. Longshare, J. G. Shaw, Julian Field, C. E. Foss, Otto Sollner, A. B. Story, L. E. Allen, C. F. Chadwick, A. R. Schulenburg, James W. Jackson, 181 John H. Ferry, Frank W. Hedges, A. V. Bills, C. L. Barber, A. J. Stokes, T. E. Walker, A. J. Grainger, E. P. Hammack, Wah Hong, Edward Gulick and William Gulick and Henry Gulick, Partners, Doing Business under the Firm Name of Gulick Brothers; John J. Jones, Wm. D. Webber, W. F. Stearns, W. J. Henderson, P. W. Morse, O. Darling, S. J. Bradt, R. W. Vaughan, E. J. Elliott, M. E. Jennings Verity, J. E. Stephens, R. G. Wallace, George H. Hancock, Frank Howe, I. N. Morse, Emil O. Hoeh, C. S. Johnson, J. H. Clough, George L. Henderson, M. Cox, John Johnson, A. T. Burr, A. M. Jameson, H. E. Klamer, J. H. Dean, P. S. Leisenring, J. M. Johnson, Ah Quinn, Ah Lit, J. M. Ballou, S. H. Dale, George M. Tutton, E. P. Lounsbury, George W. De Tar, S. D. Foss, Austin Carey, George J. Jecock, D. S. McBean, Quincy A. Petts, Morton Penfield, J. A. Thomas, J. O. Reinhart, William Doyle, F. O. Reinhart, H. I. Atwater, E. H. Woods, N. H. Downs, Edwin S. Belcher, W. G. Terril, T. G. Ellis, W. M. Carr, D. F. Garrettson and Elisabeth A. Garrettson, Executors of the Estate of G. A. Garrettson, Deceased; George M. Darnell, Flora B. Arnot, J. W. Stearns, P. W. Beck, M. G. Miller, J. F. Morrill, Fred W. Pearson, Sunnyside School District, N. J. Pillsbury, Julia Latta, Mary R. Klamer, Thomas Lindsay, E. P. Carr, I. M. Howe and H. B. Howe, Partners, Doing Business under the Firm Name of Howe Brothers; Arthur Ryan and Michael Mack, Partners, Doing Business under the Firm Name of Ryan and Mack; James H. Forbes, J. A. Pinkerton, S. D. Murdock, W. Weitekamp, John L. Davis, George H. Eaton, George Rippe, J. H. Greife, F. W. Reid, R. S. Harris, Sweetwater School District, L. W. Goff, George Dashbaugh, Henry Walker, C. C. Hughes, Frank A. Kimball, Henry Haberfellner, F. Mederle, L. C. Wright, Cyrus Johnson, A. W. Howard, Laura F. Meyer, George F. McMurtry, F. H. Downes, N. W. Downes, Complainants,

vs.

SAN DIEGO LAND & TOWN COMPANY OF MAINE, Defendant.

182 On motion of A. Haines, Esq., of counsel for the complainants in said cause, it is ordered that the appeal of the said complainants from the order and decree made and entered on the 5th day of December, 1898, in the above-entitled cause to the Supreme Court of the United States be, and the same hereby is, allowed, and that a transcript of the record, pleadings, papers, and proceedings upon which said order and decree were made, duly authenticated, be sent to the said Supreme Court of the United States. It is further ordered that the said appeal be, and the same hereby is, made returnable before the said Supreme Court of the United

States on the 1st day of February, 1899, and, no supersedeas being desired by the appellants, it is further ordered that the amount of the bond for costs to be given by said appellants be, and hereby is, fixed at five hundred (500.00) dollars.

183 In the Circuit Court of the United States, Ninth Circuit,  
Southern District of California.

H. C. OSBORNE ET AL., Complainants,	} No. 839. In Equity.
vs.	
SAN DIEGO LAND & TOWN COMPANY OF	
Maine, Defendants.	} Bond on Appeal.

Know all men by these presents that we, H. Gulick, Jr.; George Daschbaugh, P. B. Smith, A. C. Crockett, Herbert B. Howe, C. S. Johnson, A. P. Carr, F. B. Merriam, J. W. Stearns, D. K. Adams, as principals and in behalf of all the complainants and appellants in said action, and Hans Marguard and H. C. Hodge, as sureties, are held and firmly bound unto the defendant, The San Diego Land and Town Company of Maine, in the full and just sum of \$500, to be paid to the said defendant, San Diego Land & Town Company of Maine, and its certain attorneys, executors, administrators, and assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 8th day of December, 1898.

Whereas lately, at the circuit court of the United States for the southern district of California, in a suit depending in said court between H. C. Osborn and other complainants and said San Diego Land & Town Company of Maine, defendant, a decree was rendered against all the complainants in said action, and all the said complainants having obtained an appeal to the Supreme Court of the

184 United States and filed the same in the clerk's office of the said court to reverse the decree in the aforesaid suit, at the August term, 1898, of said court, being the term at which said decree was rendered :

Now, the condition of the above obligation is such that if the said complainants shall prosecute their appeal to effect and answer all costs if they fail to make the said plea good, then the above obligation to be void; else to remain in full force and virtue.

Witness our hands and seals as of the date first above written.

H. GULICK, JR.  
GEORGE DASCHBACH.  
P. B. SMITH.  
A. C. CROCKETT.  
C. S. JOHNSON.  
H. B. HOWE.  
E. P. CARR.  
F. B. MERIAM.  
J. W. STEARNS.  
D. K. ADAMS.  
HANS MARGUARD.  
H. C. HODGE.

STATE OF CALIFORNIA, }  
 County of San Diego, } ss.:

Hans Marguard and H. C. Hodge, the persons named in and who subscribed the foregoing undertaking as the sureties thereto, having severally sworn, each for himself, says that he is worth the amounts specified in said undertaking as the penalty thereof over and above all his just debts and liabilities, exclusive of property exempt from execution, and that he is a resident and freeholder within the State of California.

HANS MARGUARD.  
 H. C. HODGE.

Subscribed and sworn to before me this 10th day of December, 1898.

M. L. WARD,  
 [SEAL.] Notary Public in and for the County of San Diego,  
 State of California.

(10c. int. rev. stp.)

Approved in open court by—  
 ROSS,  
 Circuit Judge.

185 (Endorsed:) United States circuit court, ninth circuit, southern district of California. No. 839. In equity. H. C. Osborn *et al.*, complainants, *vs.* San Diego Land & Town Company of Maine, defendant. Bond on appeal. Filed Dec. 12, 1898. Wm. M. Van Dyke, clerk.

186 In the Circuit Court of the United States of America of the Ninth Judicial Circuit in and for the Southern District of California.

No. 839.

H. C. OSBORNE, WILLIAM KNAPP, A. BARBER, MRS. E. L. WILLIAMS, T. M. Eaton, J. M. Davidson, A. J. Smith, A. Hammond, John T. Judkins, Henry Gulick, Sr.; H. S. Whittaker, A. Barnett, J. N. Woodward, A. B. Stephens, John Nickson, J. H. Fawcett, Payne Brown, W. E. Montgomery, Monroe Johnson, A. Haines, M. L. Ward, Ella B. Ward, A. Keene, Fred Keene, E. K. Earle, H. F. Earle, Thomas Walker, A. G. White, W. J. Brower, P. B. Smith, F. B. Merriam, H. Hyatt, H. Stegeman, R. S. Harris, A. A. Gooden, G. A. Dukes, C. H. Rippey, Virginia Rippey, C. C. Jones, J. L. Griffin, Tallie Spencer Sullivan, W. C. Kimball, J. C. Frisbie, S. W. Morgan, George Hannahs, F. B. Webb, John Habersellner, W. S. Wilkins, S. W. Haines, Chula Vista School District, S. Healey, M. E. Phinney, D. L. Murdock, Dan. P. Stetzelberger, R. P. Middlebrook, Anson Titus, W. A. Henry, J. W. Preston, W. E. Ballinger, J. H. Blakeslee, Herman Banke, J. C. Alles, D. K. Adams, A. J. Morley, C. F. Wiggins, S. F. Dickinson, O. C. Noyes, J. E. Clouse, Peter Morse, E. W. Dyer, Parsons Shaw,



A. C. Crockett, E. E. Flanders, Elisia M. Gavin, Stephen Sheffield, C. A. Whittemore, F. Gardner, Charles Monnike, Carl Reinisch, David K. Horton, George Henninger, J. M. Cook, O. H. P. Forker, I. N. Lamson, George D. Hayes, A. A. Groat, R. H. Longshare, J. G. Shaw, Julian Field, C. E. Foss, Otto Sollner, A. B. Story, L. E. Allen, C. F. Chadwick, A. R. Schulenburg, James W. Jackson, John H. Ferry, Frank W. Hedges, A. V. Bills, C. L. Barber, A. J. Stokes, T. E. Walker, A. J. Grainger, E. P. Hammack, Wah Hong, Edward Gulick and William Gulick  
 187 and Henry Gulick, Partners, Doing Business under the Firm Name of Gulick Brothers; John J. Jones, Wm. D. Webber, W. F. Stearns, W. J. Henderson, P. W. Morse, O. Darling, S. J. Bradt, R. W. Vaughan, E. J. Elliott, M. E. Jennings Verity, J. E. Stephens, R. G. Wallace, George H. Hancock, Frank Howe, I. N. Morse, Emil O. Hoeh, C. S. Johnson, J. H. Clough, George L. Henderson, M. Cox, John Johnson, A. T. Burr, A. M. Jameson, H. E. Klamer, J. H. Dean, P. S. Leisenring, J. M. Johnson, Ah Quinn, Ah Lit, J. M. Ballou, S. H. Dale, George M. Tutton, E. P. Lounsbury, George W. De Tar, S. D. Foss, Austin Carey, George J. Jecock, D. S. McBean, Quincy A. Petts, Morton Penfield, J. A. Thomas, J. O. Reinhart, William Doyle, F. O. Reinhart, H. I. Atwater, E. H. Woods, N. H. Downs, Edwin S. Belcher, W. G. Terrii, T. G. Ellis, W. M. Carr, D. F. Garrettson and Elisabeth A. Garrettson, Executors of the Estate of G. A. Garrettson, Deceased; George M. Darnell, Flora B. Arndt, J. W. Stearns, P. W. Beck, M. G. Miller, J. F. Morrill, Fred W. Pearson, Sunnyside School District, N. J. Pillsbury, Julia Latta, Mary R. Klamer, Thomas Lindsay, E. P. Carr, I. M. Howe and H. B. Howe, Partners, Doing Business under the Firm Name of Howe Brothers; Arthur Ryan and Michael Mack, Partners, Doing Business under the Firm Name of Ryan and Mack; James H. Forbes, J. A. Pinkerton, S. D. Murdock, W. Weitekamp, John L. Davis, George H. Eaton, George Rippe, J. H. Greife, F. W. Reid, R. S. Harris, Sweetwater School District, L. W. Goff, George Dashbaugh, Henry Walker, C. C. Hughes, Frank A. Kimball, Henry Haberkellner, F. Mederle, L. C. Wright, Cyrus Johnson, A. W. Howard, Laura F. Meyer, George F. McMurphy, F. H. Downes, N. W. Downes, Complainants,

vs.

SAN DIEGO LAND & TOWN COMPANY OF MAINE, Defendant.

I, Wm. M. Van Dyke, clerk of the circuit court of the  
 188 United States of America of the ninth judicial circuit in and for the southern district of California, do hereby certify the foregoing one hundred and eighty-five (185) typewritten pages, numbered from 1 to 185, inclusive, and comprised in one volume, to be a full, true, and correct copy of the record, pleadings, papers, assignment of errors, and of all proceedings in the above and therein entitled cause, and that the same together constitute the transcript of the record on appeal to the Supreme Court of the United States in said cause.

I do further certify that the cost of the foregoing record is \$125.55, the amount whereof has been paid me by the appellants in said cause.

In testimony whereof I have hereunto set my hand and affixed the seal of the said circuit court of the United States of America of the ninth judicial circuit in and for the southern district of California, this 23rd day of January, in the year of our Lord one thousand eight hundred and ninety-nine, and of the Independence of the United States the one hundred and twenty-third.

WM. M. VAN DYKE,

*Clerk of the Circuit Court of the United States of America of the Ninth Judicial Circuit in and for the Southern District of California.*

[Ten-cent U. S. internal-revenue stamp, canceled Jan. 23, 1899. Wm. M. Van D.]

Endorsed on cover: File No., 17,286. S. California C. C. U. S. Term No., 201. H. C. Osborne, William Knapp, A. Barber, *et al.*, appellants, *vs.* The San Diego Land and Town Company of Maine. Filed January 30th, 1899.

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(1740)



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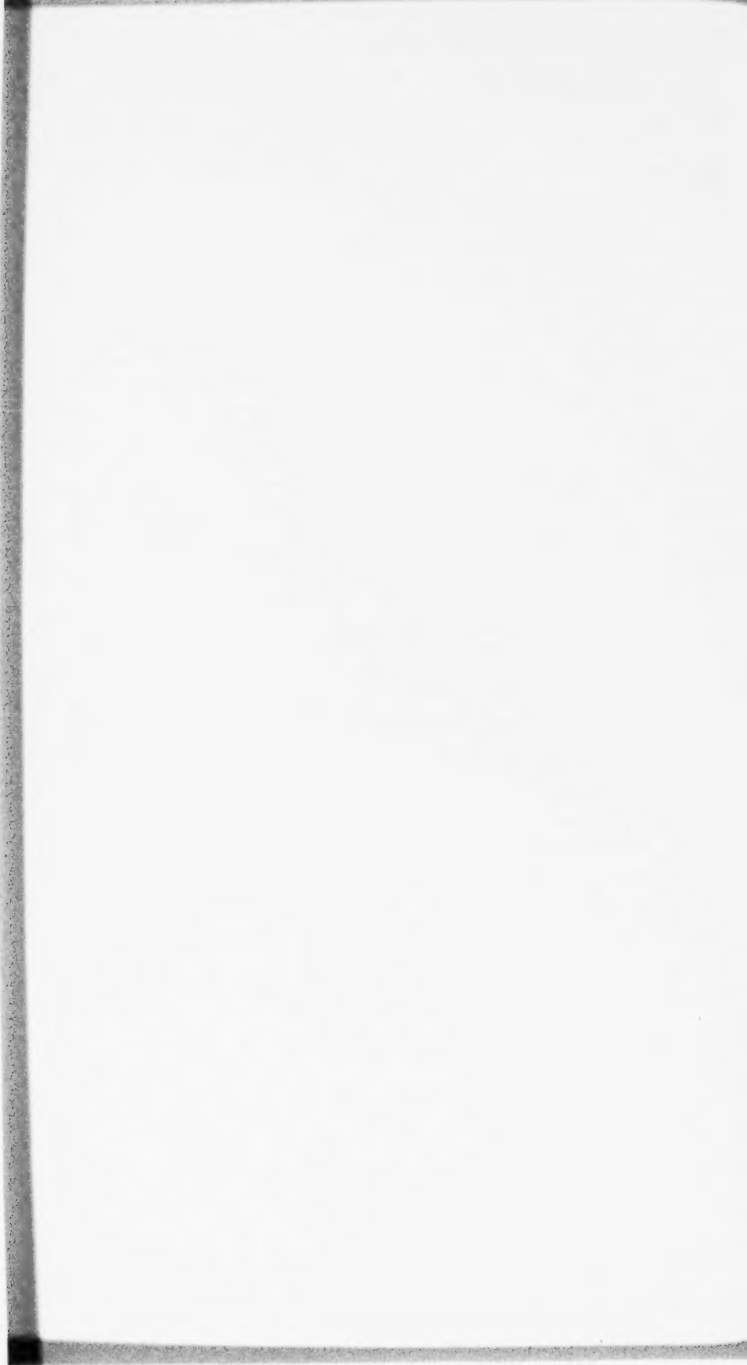
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# Supreme Court

of the

United States.

OCTOBER TERM 1899.

No. 201

H. C. OSBORNE, ET AL.,

*Appellants,*

VS.

SAN DIEGO LAND AND TOWN  
COMPANY OF MAINE

*Appellees.*

## BRIEF FOR APPELLANTS.

### STATEMENT OF CASE.

This is an appeal from the decree of the Circuit Court of the Southern District of California, entered December 5th, 1898, dismissing a pure bill of review, filed Aug. 12, 1898, by the appellants as complainants, against the appellee, San Diego Land & Town Company of Maine, a corporation, as defendant; after such defendant's demurrer to the bill had been sustained.

The object of the bill is to review, reverse and set aside, for alleged errors apparent on the face of the record, the final decree entered, in form *pro-confesso*, in the original cause in said court on February 12, 1898, in favor of said corporation as complainant, against said H. C. Osborne and others, the appellants here, as defendants. All the defendants to the decree in the original cause joined as complainants in the bill of review and join in this appeal.

The jurisdiction of this court is invoked upon the whole case, under sub-divisions 4 and 6 of Sec. 5 of the judiciary act of March 3, 1891, on the averments of the answer in the original cause, upon the assignments of error in the bill of review preserved in the assignments of errors filed with the petition on appeal.

The litigation in the original cause, grew out of the effort on part of the complainant therein, Charles D. Lanning, the Receiver, appointed by said Circuit Court, of the San Diego Land & Town Company, a Kansas corporation, to increase the annual rate for irrigation of the lands of the defendants to the original bill, under the water system of the last named corporation, from the then existing rate of \$3.50 per acre to \$7 per acre; and, to enforce collection of such increased rate against the consent of such defendants.

As a means to this end, Lanning, as such Receiver, caused as stated in the original bill (Trans. p 11) "the water to be shut off from the premises of the defend-

ants"; and for the purpose of obtaining a decree to maintain himself in thus enforcing payment of the demanded increase of rate, filed his bill in the Circuit Court January 6, 1896, and made defendants thereto, the appellants as the users of water from said system, who were outside of the municipality known as National City. The bill of review shows the proceedings in the original suit.

Such original bill set forth in substance :

#### **ORIGINAL BILL.**

That the complainant, a citizen and resident of Massachusetts, was appointed on September 4, 1895, by the United States Circuit Court for the District of Massachusetts, confirmed by order of said Circuit Court for the Southern District of California, Receiver of the San Diego Land & Town Company, a corporation organized under the laws of Kansas; that the defendants were residents and citizens of California; that said corporation was the owner of water, water rights and a water system for furnishing water to consumers for domestic, irrigation and other purposes, and of a franchise for impounding, sale, disposition and distribution of water to the defendants and other consumers, and to the City of National City and its inhabitants; that its reservoir is situated in the Sweetwater River, a stream about five miles distant from said National City, and that its system can supply a limited amount of farming lands within and outside of said National City and in part the residence portion of National City;



That up to January 1, 1896, in procuring said water, water rights, reservoir and distributing system and in preparing itself to supply consumers, the Company expended \$1,022,473.54, which was reasonably necessary for such purposes.

That by such expenditure, the Company acquired, subject to the public use and the regulation thereof by law, its water, water rights, reservoir site and reservoir of the capacity of 6,000,000,000 gallons, and has constructed and laid therefrom its water mains, pipes and all other things necessary to connect said water supply with the premises and buildings of the defendants and each of them and with the premises and buildings of said city and its inhabitants, and to furnish each of them with water, and was at the time in the bill thereafter mentioned furnishing each of them with water.

That the value of said Company's property and franchise necessary for the proper operation of its business and now owned by it is \$1,100,000 and that the same is necessary for the use of such company in furnishing water to the defendants and other consumers.

That the defendants are owners, respectively, of tracts of land under the system of said Land & Town Company, most of said defendants owning and holding small tracts of a few acres each.

That each of said defendants has, by purchase or otherwise, become the owner of a water right to a part

of the water appropriated and stored by the company, necessary to irrigate his tract of land, and is liable to pay for the use of said water a yearly rental, such as said Company is entitled to charge and collect.

That the annual expense of operating and keeping in repair the water system of said Company and furnishing consumers with water is, including interest on its bonds, and excluding the natural and necessary depreciation of its system, \$33,034.99.

That in order to acquire and construct its said system of water works, said company was compelled to and did borrow \$300,000, and is compelled to pay as interest thereon the sum of \$21,000 annually, which sum must be realized from the sale of its water and is part of its operating expenses.

That the proportionate share of the revenues of said Company that should be raised by water rates within the limits of said National City, as compared with the revenues that should be raised and paid as water rates by consumers outside of said city is about one-third.

That in order to pay the said Company the amount of its annual expense and an increase of six per cent on the amount so invested up to January 1, 1896, it is necessary that the rates for water sold and consumed be so fixed as to yield to said company \$119,791.66.

That all of the mains and pipes of said Company and other of its property so used in furnishing water to consumers are perishable property, and require to be

replaced at least once in sixteen years and require frequent repairs.

That the total amount that was realized by the said Company from sales of water and water rights and from all other sources, on account of its business of supplying water to consumers, outside of National City, for the year ending January 1, 1896, was about \$15,000, and that no more than that sum can probably be realized for the year ending January 1, 1897, at the rates now prevailing.

That the amount that can be realized from said city and its inhabitants per annum from the rates prevailing under the ordinance mentioned in the complaint, is \$10,715.00.

That though the franchise and right of said Company to furnish water to said consumers is not exclusive, no other person or corporation is or ever has been furnishing water to the defendants and that there is no other system of water works by which the defendants can be furnished with water.

That the City of National City is a municipal corporation; and that on Feb. 20, 1898, the Board of Trustees of said city, pursuant to the constitution and laws of California, passed an ordinance fixing water rates for water furnished by said Company to consumers within said city.

That said corporation commenced to furnish water to consumers in 1887; that it was then informed by its

engineer that its system, and the supply of water that could be stored thereby, would furnish water to consumers sufficient to irrigate 20,000 acres of land and supply such water in addition, as would be necessary for domestic use inside and outside of said City of National City. That the Company was then unfamiliar with the operation of such a plant and system and did not know what would be the cost of operating and maintaining it.

That relying upon the said report and estimate of its engineer as to the probable duty of its reservoir and capacity of its system, and believing that by fixing and charging an annual rate of \$3.50 per acre for irrigation, it could meet its operating expenses and pay it some interest on the investment, it fixed and established and has since charged said rate of \$3.50 per acre per annum, and no more, until January 1, 1896.

But that instead of being able to supply from its system water sufficient to irrigate 20,000 acres, it has been demonstrated by its actual experience that said system will not supply water sufficient to irrigate to exceed 7,000 acres together with the water demanded for domestic use, and it is believed not to exceed six thousand acres, although there are 10,000 acres under its system susceptible of irrigation.

That at the rate of \$3.50 per acre, if water should be demanded and used upon the whole of the lands which the system is able to supply with water, and with equal rates for irrigation and domestic use in said National

City, the Company could not pay its operating expenses and maintain its plant and system; that under said rates, it has been and is losing money every year, and its plant and system has been, and is gradually, going to decay, from natural depreciation, consequent upon its use, without revenue or means being provided for replacing the same, whereby the system will be wholly lost to it, and it will, if said rate of \$3.50 is maintained, be compelled to furnish water to consumers at an actual and continuous loss.

That in order to pay the cost of operation and maintenance of the plant, and pay the Company a reasonable interest on its investment, or a reasonable sum for its services in supplying water to the defendants and other consumers, it will be necessary for it to charge not less than \$7.00 per acre per annum for irrigation purposes and that said sum of \$7.00 per acre is a reasonable rate for consumers to pay, and the smallest amount for which said Company can furnish the water without loss to it.

That an increase of the rate for such rentals is necessary to enable the complainant to pay the expense of maintaining and operating said plant.

That by the laws of the State of California, the Board of Supervisors may, on petition of twenty-five inhabitants and tax payers of the county, fix the rate of yearly rental to be collected by any company furnishing water to consumers, but that such petition, has

never been presented or rates fixed in the case of said Company.

That for the above stated reasons said Land & Town Company gave notice to the defendants, that on January 1, 1896, it would establish a rental of \$7 per acre, per annum, for water supplied to each of their lands for irrigation, and that from and after said date each of them would be required to pay said sum for irrigation of their respective lands; and that said Lanning, after his appointment as such Receiver, and before said date, gave a like notice.

That the defendants each refused to pay said rate of \$7 per acre, and maintain that neither said Company nor said Receiver have any legal right to increase the amount of rental to be paid by any of them, and that the rate of \$3.50 established and collected by said Company must be and remain the established rate until a rate is established by the Board of Supervisors of the County.

That in order to enforce the payment of said rentals he has caused the water to be shut off from the premises of the defendants, and each of them, until such rentals are paid; that each of said defendants threatens to and will, unless restrained by the court, commence suit in the Superior Court of the County of San Diego, State of California, to compel the complainant receiver to turn on and furnish water to their said lands without the payment of \$7 per acre rental on the ground that they are entitled to the use of said water

for \$3.50 per acre, the rate theretofore prevailing; and for damages for cutting off their said supply of water.

That the right of the defendants are the same, and the determination of the right of said Company and said Receiver to increase the rate of rental to be charged and collected, will affect all of the defendants the same, way and to the same extent, except as that the quantity of land owned by each varies.

That the bringing of separate suits of the defendants will involve the Company and Receiver in a multiplicity of suits, and put them to great and unnecessary cost and expense, and will seriously hinder complainant in the proper operation and management of the property of the Company, and the settlement of its outstanding obligations, when all the questions involved and the rights of all the parties in interest can be better determined in one suit and litigation and expense and unnecessary interference with complainant's management and control of the property and business of the Company, can be avoided.

That the proposed increase in rates will add to the revenue and earnings of the Company from the sale and distribution of the water from its said system with the amount of land now under irrigation, not less than \$14,000, per annum, and upon the whole of the lands that can be irrigated by the system of the Company, of not less than \$21,000, per annum.

The prayer is for an injunction against the defendants from prosecuting in the State Court or elsewhere,



separate actions against the complainant or said Company; that the defendants each be required to set up any claim he has against the right of the Receiver or said Company to increase the rental for water furnished by said Company, and for final decree that such Receiver and said Company have the right to increase the amount of its rentals to any reasonable sum, and that the sum of \$7 per acre, per annum, is a reasonable rental to be charged and that each of the defendants be required to pay such rate as a condition upon which water shall be furnished them, and for general relief.

#### ANSWER.

The defendants, on Sept. 13, 1897, after all their former answers had been expunged, on exceptions filed by the complainant for impertinency, and the defendants had been directed to make further answer, filed their further answer and supplemental answer to the original bill, sworn to by one of the defendants; by an order entered pursuant to that stipulation of the parties, the oath of any one of the defendants was treated as the oath of all, and the answer was treated as though sworn to by all. (Trans. p. 38).

As the case presents itself (See division II of Argument), the admissions, denials and averments of new matter in such answer are to be taken as the facts in the case. For that reason the substance of the answer is re-stated here.

**SUBSTANCE OF ANSWER.**

The answer admitted that the complainant, Charles D. Lanning, was appointed Receiver of the San Diego Land & Town Company, a corporation, (hereinafter referred to as "the corporation"), organized under the laws of Kansas, as alleged in the complaint, and that as such Receiver he took possession and management of the property described in the bill. It sets forth the purposes for which said corporation was formed. (Trans. p. 14).

It admitted and averred that such corporation became, as in the answer set forth, the owner of a dam, reservoir and entire water system adapted to furnishing water for domestic, irrigation and other purposes, for which water is needed for consumption; that by reason of grants as set out in the answer, such corporation became the owner in fee simple of all water and riparian rights in the Sweetwater River, and of the bed of the River, from the highest to the lowest point of its reservoir, down to San Diego Bay, a public and navigable water of the Pacific Ocean.

That the corporation commenced the construction of its dam in November, 1886, and prosecuted work upon the same, and upon its mains and lateral pipes, for furnishing water, and by February, 1888, had completed the same; that the capacity of the reservoir is six billions of gallons; that the water system covers and can supply about 9,000 acres of the 12,000 acres of territory thereunder, consisting of farming lands,

within and outside of National City; and in addition to supplying said 9,000 acres, can supply the domestic uses and needs of a population, when settled on lands within and without National City, of 20,000 persons.

It admitted that in so acquiring the water, water rights, reservoir and distributing system; and in preparing itself to supply the water, the Company expended up to January 1, 1896, a considerable sum of money, but that how much the defendants have neither knowledge, information nor belief.

And it averred that the right and title of the Company to the reservoir and system for furnishing water therefrom to consumers for domestic, irrigation and other purposes, and for collecting rates and compensation therefor, so acquired by it, are subject to the water rights, easements in and servitudes upon the said reservoir and system, and to all other rights acquired by these defendants therein and annexed to their respective parcels of land.

It admitted that the defendants each (with two named exceptions) are the owners of tracts of land under this water system, and that most of them own and hold small tracts of only a few acres each; and averred that none of them own to exceed twenty-five acres irrigated from the system except one, Kimball, who owns about seventy acres; and that all the defendants own their tracts in severalty except that two tracts of twenty acres and two of ten acres, each, are owned by tenants in common.

It admitted that each defendant owning land as set forth in the answer has become the owner of a water right to a part of the water appropriated and stored by the Company, necessary to irrigate his and her land so owned.

And it averred that the water right so owned by each defendant, respectively, extends not only to the irrigation of the respective tracts of land, but also to supplying the needs of persons resident and of animals kept thereon.

It averred that each of such water rights embraces the right and easement of the service of the reservoir and distributing system of the corporation, for the delivery of the water at and upon the respective lands of the defendants for all of those uses by the automatic gravity of pressure under the system; and that each such water right and easement is in freehold and is a freehold servitude imposed upon such water system for the benefit of the land to which it is appurtenant, and that all claims and demands of said Company for the price or compensation therefor have been paid or otherwise satisfied by purchase or otherwise, as in the bill of complaint alleged.

It further averred that such water rights extend to and include the right to have the corporation maintain the system efficiently to conduct the water to and deliver the same on the premises of each of the defendants, for irrigation and other uses, at and for the an-

nual rates to be deemed and accepted as the legally established rates therefor under the facts in the answer thereafter set forth.

It admitted that at the times mentioned in the complaint the corporation was furnishing each of them with water through its system.

The answer further allged that of the 12,000 acres of farming and orchard lands under the water system, the corporation in January, 1887, held for sale, use and profit, about 7,000 acres, and that the lands owned in 1887 by others, are in detached parcels scattered among the lands of the corporation. That all of these lands were in January, 1887, entirely unsettled and in the wild and natural state, and almost entirely arid, and of but little value without water for irrigation.

That the corporation acquired its water, water rights, reservoir site, reservoir and distributing system, for the purpose of devoting the same, first to irrigate its own land and to supply the needs of settlers upon such lands, who should be induced to purchase them from the corporation as lands under irrigation.

That the object of such corporation in constructing and acquiring such water system was to enable it to sell its lands as irrigated lands, with the easement of the perpetual flow and use of water necessary and useful to irrigate the same, and to supply all the beneficial uses of the people who should be settled upon them, annexed as appurtenances in freehold thereto, and to

create the freehold servitudes upon its water system corresponding to such easements. That such water, water rights and water system, to the extent necessary and useful for the irrigation of the lands of the corporation, became a part of its lands and merged in the estate of the corporation in its reality as one estate. And that subject to the purposes so stated, the corporation devoted and appropriated the remainder of the capacity and service of its water system to the sale, rental and distribution of the use of water to the public.

That the corporation in part execution of its such first and primary project for selling its own lands, laid out and platted its tract known as Chula Vista, consisting of about 5,000 acres, in blocks of 40 acres each, subdivided in lots of 5 acres each, and bounded each such blocks by streets and avenues, and laid water pipes, so that its distributing system was made sufficient to reach and serve with water each five acre lot on the Chula Vista Tract, and also to reach its farming lands within National City, Sweetwater Valley, elsewhere within National Ranch, in Otay Valley and in the tract known as Ex-Mission; that nine-tenths of the corporation's distributing pipe system, when laid out and ready for operation in February, 1888, was laid in anticipation of future use and demand for water supply, and not for any use then existing, and that when laid, it was, and to a great extent still is, ahead of the demands therefor, and that much thereof has laid unused.

The answer further alleged, that from the inception of its enterprise, the corporation held its farming and orchard lands for sale, and up to January 1, 1896, did, as an inducement to the purchase, both privately and publicly and continuously, in writing subscribed by it and otherwise, represent that the water of its system was piped to and over its lands and lots, and was, and would be, supplied to purchasers thereof in abundance, for irrigating the same, at the rate of \$3.50 per acre per annum, for farming and orchard lands; and that from 1887 up to January 1, 1896, it kept its lands continuously on the market for sale, with and under such representations as to water supply therefor, and as to the annual rate for irrigation of the same; that the lands of the corporation in the Sweetwater and Otay Valleys and in the Ex-Mission, about 5,700 acres, without water from the system, have at no time been worth more than an average of \$35.00 per acre, and in Chula Vista no more than \$75.00 per acre; that with the appurtenant water supply, the corporation has at all times, since early in the year 1887, treated the value of its lands as proportionately enhanced, and since early in 1887, held its raw lands in the Sweetwater and Otay Valleys and in the Ex-Mission, at an average price of \$250 per acre, and in Chula Vista at prices ranging from three to five hundred dollars per acre, except that it offered and sold about six five acre tracts of its Chula Vista lands at \$150 per acre, as an inducement to the first few purchasers to locate thereon; and has at all times held its lands, where improved by it with the aid of such



appurtenant water supply, outside of the value of improvements, on the same basis of valuation for land and water.

The answer alleged that up to the date of the suit at such prices, and under the representations that the annual rate for water for irrigation was, and would be, \$3.50 per acre, the corporation, had sold to certain of the defendants and to their predecessors in title, severally, parcels of such irrigated lands, outside of National City, aggregating about 1,200 acres, with the freehold easement of water supply annexed, as incident and appurtenant to the land granted; that each purchaser thereof, respectively, relied upon such representations of the corporation that the annual rate for water to be supplied for irrigation, was and would remain not higher than \$3.50 per acre; and that in each case of such sale, the corporation, prior to making its conveyance, connected the land with the actual flow of water from its system, both for irrigation and domestic and other uses; and in respect of lands so sold by the corporation in Chula Vista, it exacted from and imposed upon each of the purchasers an obligation to erect a residence thereon at once, to cost not less than \$2,000.

The answer further alleged that up to December, 1892, the corporation made no express or separate grant of "water rights" as appurtenant to the lands sold by it, but granted the easement of the flow and use of water from its system as an appurtenant of the land sold, with the land after it had been connected

with the water system and the water had been applied to irrigate the land sold and to the uses of persons living and animals kept thereon; and contracted for and received compensation for both the land and appurtenant water right in a single price for both; that after December, 1892, the corporation, in all cases of sales of its lands by an express contract in writing, specifically sold to those of the defendants who purchased lands from it after that date, the appurtenant water right, and that each of such contracts contained the following provisions (the description of the land and the price for the same with the water being adapted to each case respectively) to-wit:

"That in consideration of the stipulation herein contained, and the payments to be made, as herein after specified, the party of the first part (the corporation) hereby agrees to sell unto the party of the second part, and the party of the second part agrees to purchase of the party of the first part, the following real estate, to-wit: (Description) together with a water right to one acre foot of water per annum for each and every of said above described real estate, to be delivered by the party of the first part through its pipes and flumes at a point—said water to be used exclusively on said real estate, and not to be diverted therefrom. Provided, that the party of the first part may change the place of delivery of said water, so long as the same is near the highest point of said land. For which land and water right the party of the second part agrees to pay the sum of \_\_\_\_\_ dollars.

"And the party of the second part further agrees and binds —self — heirs, executors and assigns to pay the regular annual water rates allowed by law and charged by the party of the first part for water covered by said water rights, whether such

"water is used or not, and to pay for all water used "on said land for domestic purposes, monthly, under "such rules and regulations for the delivery of water to "consumers, as the party of the first part may from "time to time make."

The answer further alleged that in character and quality of the appurtenant water rights connected with the land sold by the corporation, no discrimination exists or has at any time been claimed by the corporation, or had at any time been recognized by the purchasers, between the lands sold by it after the inauguration of such water system up to December, 1892, and those sold by it after that date, with the express and specific provisions as above set forth.

The answer further alleged that the title to about 900 acres in the aggregate, lying outside of National City, was not derived from the corporation; that to such lands the corporation furnished water for irrigation to so much thereof as came under cultivation up to December, 1892, without exacting a price for a water right, but voluntarily annexed the perpetual easement of the flow and use of water from its system to such lands, and voluntarily, in all respects, has, from the beginning of its water service, treated and still treats the same, as to water rights, in all respects on the same footing as the lands sold by it as above alleged. And that, from the beginning of its water service in 1887, until now, the annual water rates actually established and collected by the corporation for water furnished by it to land not sold by it,

have been the same as for water supplied to lands sold by it.

The answer further alleged that after December, 1892, such corporation refused to furnish water to irrigate other and further lands under the system, not owned or sold by it, except on payment of a sum in gross for the water right over and above the uniform annual rate as actually established and collected from all lands under the system, or in lieu thereof, six per cent annual interest upon the estimate of the value of such right which it first fixed at \$50.00 per acre and later raised to \$100 per acre, and only under a form of contract which contained clauses, the material portions of which are as follows (the filling of blanks being adapted to each case):

"That the party of the first part (the corporation) "agrees to and does hereby sell to the party of the "second part a water right to one acre foot of water "per acre, per annum, for each and every acre of the "real estate hereinafter described, to be delivered "through the pipes and flumes of the party of the first "part — for the sum of — dollars, payable "as follows: —. Provided the party of "the first part may at its option change the place of "delivery of said water, so long as the same is near the "highest point on the lands for which the water is de- "livered. . . . said water right is sold for the use of, "and to be appurtenant to the following described "real estate now owned by the party of the second "part. . . . and it is expressly understood and agreed "that the water right hereby sold shall belong to said "described real estate and to be used thereon "and not diverted therefrom or used on any "other lands. In consideration of the forego- "ing stipulation and agreements the party of the sec-

"and part agrees and bind ——self, —— heirs,  
 "executors and assigns, to pay the sums above speci-  
 "fied as the sums, and each of them, fall due, . . . . .  
 "and that —— and they will promptly pay all  
 "annual water rates and charges for the water to  
 "which —— is entitled under and by virtue of  
 "this agreement, at rates fixed by the party of the  
 "first part as allowed by law, and at the times, in the  
 "manner, and according to the rules and regulations  
 "made and adopted by the party of the first part, the  
 "annual rental for the amount of water to which the  
 "party of the second part is entitled under this con-  
 "tract, to be paid whether the same is used or not, and  
 "also to pay for all water used by —— on said land  
 "for domestic purposes at the rates fixed by the party  
 "of the first part and allowed by law."

And that under this form of contract the corpora-  
 tion annexed the water rights referred to in the (or-  
 iginal) bill, which are appurtenant to about 400 acres  
 of the lands of certain of the defendants; and at no time  
 has made or claimed, and does not now make or  
 claim, any distinction in respect of the character and  
 quality of the water right, or of the annual rates actu-  
 ally established or collected for irrigation, between  
 such of the lands not purchased from it, as are fur-  
 nished with water for irrigation by it, whether under  
 such special contract for water right or without.

The answer further alleged that provided the de-  
 fendant, J. M. Ballou, owns a water right by virtue  
 of a special written contract with the Company, mak-  
 ing such water right appurtenant to his land, and for a  
 valuable consideration paid by him to the corporation  
 and containing the following provisions:

"Provided, that said party of the second part shall make application in the form provided by the Company, for the use of the water, and use the same under the same restrictions and conditions, and to pay said party of the first part the current rate therefor, as established for Chula Vista; provided said restrictions and conditions are not inconsistent with the water right hereby granted to said party of the second part."

The answer further alleged that certain of the defendants, who are owners in the aggregate of about 400 acres of what are known as Ex-Mission lands, have annexed to them water rights as alleged in the original bill, entered into a written contract with the corporation for the use and flow of the water to their lands, in which is contained the following:

"The parties of the first part will make application for use of the form provided by the party of the second part of that purpose, and pay for the use of the water at the current rates as may be enforced from time to time for supplying lands in National Ranch, and subject to the same general rules and regulations."

The answer further alleged that on or about June 3, 1895, the corporation established a classification of lands which had been, or which should be provided with water by its system, to take effect July 1, 1895, and afterwards confirmed the same to take effect January 1, 1895, and that said classification has been adopted by the Receiver, and is in words following: to-wit:

"Tenth: For the purpose of fixing rates for irri-

"gating acre property, the lands of that character are  
"classified as follows:

"All lands to which the easement and flow of water  
"for irrigation has been, or shall be, annexed, by the  
"consent or voluntary act of this company, shall con-  
"stitute the first class.

"All lands to which the easement and flow of water  
"for irrigation has not been or shall not be annexed  
"by the consent or voluntary act of the company, shall  
"constitute the second class."

And that in respect of such second class the corpora-  
tion at the same time, promulgated the following, to-  
wit:

"In addition to said annual rate for water used upon  
"lands of said second class an annual charge equal to  
"six (6) per cent of the value of the right to said ease-  
"ment and flow of water for irrigation, which said  
"value is to be taken as one hundred dollars (\$100.00)  
"per acre."

The answer alleged that the lands of each of the de-  
fendants fall within the first class, so defined by the  
corporation and its receiver. That no discrimination  
is made or at any time has been made between the  
lands of the first and second class in respect of the an-  
nual rate: that the additional charge of six per cent  
per annum upon the value of such water rights, ap-  
plies only to such lands as shall receive the use and  
flow of water from the system for irrigation on de-  
mand of their owners in cases where they shall not  
have paid or secured to be paid by contract or conven-  
tion with the corporation, the gross sum demanded  
by it for the sale of the water right for such lands; and  
that none of the lands of the defendants fall within the



second class; and that all of the defendants have accepted and concurred in and do accept and concur in the classification of lands as made by the corporation and receiver.

The answer further alleged that the corporation has planted and improved of lands still owned by it, about 1,500 acres outside of National City, using thereon water from its system as appurtenant to such land for cultivating the same, and holds such lands with appurtenant easement of water supply for sale; and that it holds the remainder of its lands under its water system, comprising about 4,000 acres to which water has not been actually applied at valuations not less than in the answer before stated for land and the easement of water supply annexed, and refuses to sell or dispose of the same without including the water supply, and except on condition of payment for the price of the land and including the price of a water right so fixed by it, or interest at six per cent, per annum, on the price of such water right at the option of the purchaser.

The answer further stated, that in estimating the annual income from water rents under its water system, the corporation has, from the beginning of its water supply, treated its lands actually irrigated by it, as being precisely on the same footing as to annual rates with the lands of each of the defendants, and has entered upon its books the same rate per acre, per annum, as chargeable to its own such lands, as that

charged to the lands of the defendants. And that the Receiver has done, and does likewise.

The answer further alleged, that the aggregate number of acres of land under irrigation from the system, including the land of the defendants, the corporation and others, does not exceed 4,300 acres, or one-half the capacity of the reservoir and main pipe lines, after allowing for the domestic uses of 20,000 persons; that the actual annual expense of operating and keeping the water system in repair, exclusive of the alleged interest of seven per cent of \$300,000 of bonds of the corporation referred to in the bill, does not exceed \$12,034.99, as stated in the bill; that the "natural and necessary depreciation of its system," referred to in the bill, is made good by the keeping of the same in repair, the cost of which is included in the annual charges; that the amount of \$25,715.00 was collected as water rentals for the year ending January 1, 1896, exclusive of any sums derived from the sale of water rights, and with the annual irrigation rate fixed at \$3.50 per acre; and for the year ending January 1, 1897, at the same rate, such rentals will yield \$27,000, with but two-thirds of the capacity of the system in use; that no part of these rentals are derived from or attributed to the lands of the corporation not actually irrigated; that, as shown by the records and official reports of the corporation, the actual surplus of receipts for water rentals accumulated in its hands, to the credit of the system after deducting the expenses of operation and maintenance, to December 31, 1894, was \$49,699.28.

The answer denied that the corporation is entitled to demand from the defendants any sums by way of water rentals to apply on the demanded income of six per cent or any net income on the alleged cost of such water system; and, denies that either of the defendants own their water rights under such system, subject to any obligation legal or equitable, other than such as arises from the actual rates established and collected by such corporation, which, in case of their lands, is \$3.50 per acre, per annum; and, denies that the compensation to such corporation for either of the respective water rights, easements and servitudes of the defendants, were or are still subject to regulation by any Board of Supervisors of the State of California, under the Act of 1885.

The answer averred, that such of the defendants as have purchased their lands with appurtenant water rights from the corporation, and such of them as have purchased of the corporation water rights made appurtenant to their lands, not bought of the corporation, have each and all paid the full amount demanded by the corporation as the price of the perpetual easement of water supply from its system, by the corporation, granted and annexed to such lands; that such easements are respectively servitudes on the Company's water system, and have been fully paid for; and that the owner of such lands are forever discharged and acquitted from payment of any further sum or sums, to apply upon the principal of, or as income upon, the cost or value of such water system, or any

debt incurred by the corporation in its construction or the value of their respective water rights; that in each of such cases where the corporation devoted water to the public use, it received satisfaction from and parted with to each of such defendants, or his or her predecessor in interest, all right to demand or collect water rentals proportioned to such lands, as corresponded or related to interest or income on the coast or value of the system or net annual receipts or profits therefrom; and that, in said respects, it has at all times put all other lands, to which it has voluntarily annexed such water rights, upon the same footing; that all such lands have remained on the same footing for more than five years; that such lands have in many cases changed owners, while so supplied with water at the same rates and on the same footing as to water rights with the land sold by the corporation with annexed water rights; that the value of such water rights has, for more than five years, entered into the market value of such lands, and has in all cases been paid for to their vendors by the present owners, those defendants, who are successors in title by mesne or immediate conveyances of the lands to which, during the former ownership, the Company voluntarily annexed such perpetual easements and water rights. And that neither any such lands, nor the owners thereof, are in any event liable for any other or further water rentals than are the lands, the ownership of which, with such water rights, were derived from the corporation.

The answer admitted that the corporation commenced to furnish water to consumers in the year 1887, and that it did as early as February, 1888, fix and establish, and has since charged the rate of \$3.50 per acre as the annual rate for irrigation and no more, until January 1, 1896.

And the answer averred that such annual rate of \$3.50 per acre is the only actual rate which has ever been established, or that has ever been collected by the corporation, or which has at any time been paid or assented to by the consumers under the system from the said beginning of such water service down to the time of filing the bill herein; that the rate, so actually established and collected, has, during more than nine years last past, been uniform as to all the lands irrigated under the system, without discrimination in respect of all the lands of the defendants at all times.

The answer further averred, that the defendants were induced to purchase, improve and settle upon their respective parcels of lands, in reliance upon the fact that said rate of \$3.50 per acre, per annum, for irrigation, under such system, has, during all said period of time, been uniformly and actually established and collected by the corporation; and that such irrigation rate has entered into the value of all the lands of these defendants and is a material element in such values.

The answer admitted that there is not now, and has not been, any other system of water works by

which the defendant can be supplied with water; it denies that the capacity of the system is sufficient to supply not to exceed 7,000 acres, together with the water demanded for domestic use, and avers that it is of sufficient capacity to supply 9,000 acres, together with the domestic uses of 20,000 persons.

The answer denied that at the rate of \$3.50 per acre, if water should be demanded and used upon the whole of the lands which the system is able to supply with water, and rates are allowed in said National City equally high for domestic uses and irrigation, the corporation would not be able to pay its operating expenses and maintain, from such rentals, its plant and system; denies that the corporation has been, or still is, under such established rates, losing money every or any year; they deny that its plant and system has been or is, gradually going to decay from natural depreciation, consequent upon its use in supplying consumers with water, without any or sufficient resources or means provided from such rates for replacing the same; denies that the corporation, if such rate of \$3.50 per acre is maintained, will be compelled to furnish water to consumers at any actual or continuous loss; and, deny that if the rentals derived from such system, at the rates actually established and collected, including said rate of \$3.50 per acre, are fairly applied to manage, operate and maintain the system, that it will be lost.

The answer denied that in order to pay such corporation its annual expense and and an annual income of 6 per cent on the present cost and value of its system, it is necessary to fix rates for water so as to realize, when the system is wholly employed, the sum of \$119,791.66, or any less sum in excess of \$32,000 per annum.

The answer avers that neither the present cost nor the present cash value of the whole water system exceeds the sum of \$300,000; that not over one-half of the capacity of the same was in use on January 1, 1896, and that not over two-thirds of the capacity of the system is now in use.

It denied that in order to pay the cost of operating and maintaining the system, and pay the corporation as much as six per cent net annual revenue upon the present cost and cash value of its plant, it is or will be necessary to charge a rate per acre, per annum, of \$7 for irrigation purposes, or any sum in excess of \$3.50 per acre, per annum, for such purposes in connection with the domestic rate under the system, actually established and collected.

The answer denied that \$7 per acre, per annum, or any sum in excess of \$3.50 per acre, per annum, is a reasonable rate for the defendants to pay; it avers that each of them is the owner of a right and easement in freehold of the flow and use of water through the system as alleged in the complaint; that the same is appurtenant to their respective lands and that their

lands fall in the first class established by the corporation; that from them the corporation is not entitled to any interest on its investment in the plant.

The answer averred that the sum of \$3.50 per acre, per annum, for the use and enjoyment of such easements and maintaining and operating the system has been actually established as aforesaid, and is the only rate which has been collected by the corporation for the nine years last past, from the defendants and their privies in title to their lands, and, that no other rate has ever been actually established in respect of their lands or at any time collected; and that said rate is the ample and sufficient contribution of such lands for the maintenance of such works.

The answer averred that each of the defendants and their predecessors in estate, as owners of such lands, for more than five years prior to the first day of January, 1896, continuously held and enjoyed the use of such water upon their land for irrigation, paying therefor the annual sum of \$3.50 per acre, per annum; and that such use and enjoyment has been open, notorious, continuous, adverse and uninterrupted. And that they have thereby acquired the right to such water for irrigation on paying therefor the said annual sum per acre; and that such a right is vested in them by the operation of Section 318 of the Code of Civil Procedure of California. And that they are entitled to said water on paying such sum per acre, per annum, and no more. And that the corporation is barred from having or maintaining any action at law or in equity



to change the character of or add to the burden of said easement, or to increase the annual payment for the use of the water, and is estopped to claim any right to change such annual payment.

The answer admitted that by the laws of the State of California, the Board of Supervisors may fix water rates as alleged in the bill, and that no petition has ever been presented or rates fixed in the case of the corporation. It admits that such corporation gave notice to defendants that on January 1, 1896, it would undertake to establish a rental of \$7 per acre, per annum, for water for irrigation on the lands of defendants, and that the Receiver, after his appointment, before said date, gave a similar notice.

It averred that at the date of such notice the defendants were in the continued enjoyment of their said water rights and easements, and were paying and always had paid to the corporation \$3.50 per acre, per annum, for each acre irrigated by them. And avers that such notice contained a further demand as a condition to the refraining, by said corporation from shutting off the water supply of these defendants under their respective easements; that each of the defendants should subscribe an instrument upon a printed form designated "Application for Water", which, among other things contained the following:

"This contract shall remain in force until the first day of next July, when it may be terminated at the request of either party, notice to be served in writ-

“ing; but in case no such request is made, then the “same shall continue in force for one year thereafter, “and so on, from year to year, until such request is “made, which request, when made, shall be to termin- “ate this contract on the following July 1st.”

The answer admitted that the defendants each refused to pay the rate of \$7 per acre; that they maintain that neither said corporation, nor its Receiver, has any right to fix the amount to be paid by any of them; and that the rate of \$3.50 per acre, per annum, actually established by said corporation by said contracts, conveyances, use and practice, and which rate has at all times been collected and paid for the use of said water, must be and remain the established rate to be paid by the defendants for said use as against such attempt of the corporation and complaint to raise the same to \$7 per acre, per annum.

The answer further sets forth the provisions of Article 14 of the Constitution of the State of California, adopted in 1879, entitled “Water and water rights”, and the provisions of the act of the Legislature of said State, approved March 12, 1885, entitled “An Act to regulate and control the sale, rental and distribution of appropriated water of this State, etc.”, with reference to Section 5 thereof, which said Constitutional and Statutory provisions are copied in the appendix to this brief.

It further averred that such rate of \$3.50 per acre, per annum, established by the corporation as set forth in the bill, is the only actual rate for irrigation which has

ever been established and collected by such corporation or its Receiver; that it is the only rate which has ever been legally established or which is to be deemed or accepted as having been legally established by said corporation therefor.

It denied that any increase of the rate for such rentals is at all necessary to enable the corporation or its Receiver to maintain and operate the plant and pay the proper expenses of said maintenance and operation.

The answer admitted that in order to enforce the payment of the proposed rental of \$7 per acre, per annum, the complainant caused the water to be shut off from the premises of each of the defendants until such demanded rental should be paid; and denies that either of the defendants threaten to commence suits in the Superior Court of the County of San Diego, to compel plaintiff to turn on and furnish the water to their lands, or for damages.

The answer admitted that the rights of the defendants are the same to the extent that all are freehold easements as alleged; it admits that the question of the right of the corporation and of the Receiver to increase the rate of rental to be charged and collected will affect all of defendants in the same way, and to the same extent, except that the quantities of land owned by them vary.

It admitted that the proposed increase in rates, if collected from all the lands irrigated under the sys-

tem, including those of defendants, and all others, including those of the corporation, would add to the rentals collected by the corporation for irrigation, any less than \$14,000 per annum.

The answer further averred that a rule was adopted by the corporation and the complainant, and in force long prior to Jan. 1, 1896, by which water rentals became due in quarterly payments in advance, commencing with January 1st of each year. And that the same became delinquent in 15 days after due, then the supply would be discontinued and not again renewed until payment was made of all arrearages; that under such rule, on the 4th day of January, 1896, when the complaint was filed herein, the demand of the complainant for increase of rentals was for the quarter year beginning January 1, 1896, and no longer; and that no rental had accrued or become due or payable, at the time of filing the bill herein, except for the first quarter of such year.

That such demanded increase of rental for any quarter of the year beginning January 1, 1896, would, in case of no defendant, severally interested, and in the case of no defendants associated as partners, be as much as, but in each case very much less than \$2,000. And in the case of the defendant having the largest number of acres of land irrigated under the system, would not equal \$58.

The answer averred that the defendants have no information except as derived from the complainant's

bill and from the records of the Recorder's office of the County of San Diego, as to whether such corporation borrowed \$300,000, or whether it was compelled to pay \$21,000 interest annually thereon.

It averred payment to the complainant, as Receiver, at all time to January 1, 1896, of the rate or rental of \$3.50 per acre, per annum, and the offer of the defendants to pay the same so long as it continues to be legally established.

The answer averred that the Statutes of the State of California of 1885, referred to in the bill and answer, in so far as it prohibits the creation of freehold easements and servitudes alleged in the answer, by contract between the corporation and consumers; and in so far as it purports to prohibit the making of contracts to extinguish, satisfy and make acquittance to the corporation of any right to net income and respecting annual rates, is void as in conflict with the 14th amendment of the Constitution of the United States, and that it is void as being in conflict with the declaration of rights contained in Section 1 of the Constitution of the State of California. And that it is void as being in conflict with Article 20, Section Nine of the Constitution of the State of California.

The answer further averred that certain defendants are not inhabitants or residents of the State of California; that certain three of them are public school corporations and not tax payers; and that certain of the defendants are not residents of the County of San

Diego, and therefore that said classes of defendants are incompetent to join in the petition of the Board of Supervisors under Section 3 of said Act of 1885.

And as to them the answer averred that such statute of March 12, 1885, is in violation of Section 1 of Article 14 of amendments to the constitution of the United States.

And the answer further averred that in and so far as such statute of 1885 purports to authorize or empower the corporation or its Receiver to shut off, or justify them in shutting off, as set forth in the bill, the water from the lands of these defendants to enforce the collection of the demanded increase of rental without permitting the defendants to have any standing in the court to test the reasonableness of such increase of rates, the same is void as being in conflict with Section 1 of Article 14 of the Constitution of the United States.

The answer further averred that the acts of the Receiver, as set forth in the bill of complainant, in undertaking to increase the rate of \$3.50 per acre, per annum, for irrigation to \$7, and in shutting off the water supply as alleged in the bill of complainant, are in violation of Article 5 of the amendments to the Constitution of the United States.

The answer further set forth the amendment of 1897 and the Act of 1885, which is copied in the appendix: and the answer further avers that by virtue of the provisions of the Constitution of the United States,

and of the State of California, and of such Act of the Legislature of March 13, 1897, the defendants had the right to enter into the contract set forth in the answer; that such contracts are valid and effectual and that the complainant had no right to make the demanded increase charge for use of water.

#### **EXCEPTIONS OF COMPLAINANTS TO ANSWER.**

To this answer, Lanning, as such Receiver, on September 22, 1897, filed "exceptions", six in number.

That numbered "first" is for alleged immateriality, irrelevancy and impertinency, and sets forth forty-four several passages of the answer as coming under it.

The general scope of this exception is to all the matters in the answer, to-wit:

Of averment that the water system involved, was at its completion, the private property of the San Diego Land & Town Company of Kansas; that this corporation granted to and invested each of the defendants with the ownership of water rights and freehold easements of the flow and use of water from its system as appurtenant to the lands owned respectively by them, and as constituting corresponding freehold servitudes on the water system; that the claims and demands of the corporation for the price or compensation for such water rights, easements and servitudes had been paid or otherwise satisfied; that by the sales, representations, agreements, contracts and acts set forth in the answer, the corporation had fixed the annual rate for irrigation under such water rights, easements and ser-

vitudes at the rate of \$3.50 per acre, per annum; and that that was the only actual rate which has ever been established or collected by the corporation or its Receiver.

And that such rate has been uniform as to all lands irrigated under the system from the beginning of the water service; that such established rate induced the purchase, improvement and settlement of their lands by defendants; that the defendants each, have for more than five years held and enjoyed adversely the use of such water at such annual rate of \$3.50 per acre, and that the corporation is barred by Section 318 of the Code of Civil Procedure of California from maintaining an action to increase the rate of the burden for the enjoyment of their easements; of denial that the corporation had the right to demand from the defendants water rentals beyond \$3.50 per acre, per annum, to apply upon net income; of denial that the compensation for such respective water rights, easements and servitudes were or are subject to regulation by any Board of Supervisors of the State under the Act of 1885; of averment that the corporation required of defendants as a condition to the refraining by it from shutting off the supply of water under their respective water rights and easements, that they should subscribe an agreement, designated "application for water", which made such water right determinable by the corporation by service of a written notice on the first day of any succeeding July; of averment relying upon and invoking the application of Section 1, Article 14



and Article 5 of the amendments to the Constitution of the United States against the State statute of 1885, so far as it prohibits the contracts set forth in the answer; and assumes to authorize the increase of the established rate of \$3.50 per acre, per annum, without the consent of the defendants; or assumes to authorize or justify the shutting off of water supply for irrigation as a means of enforcing the collection of the increased rate demanded; or, assumes to permit or authorize such enforced collection without allowing to the defendants any standing in the court to contest the reasonableness of such increase; or purports to empower any court to enjoin the defendants from contesting the reasonableness of such increase in any court; of averment relying upon the cited provisions of the Federal and State Constitution and the Act of the State Legislature of March 13, 1897, in favor of the right to make the contract for the water rights and water rates set forth in the answer, and to protect the vested interests created by such contracts.

The exception also extends to all matters of averment and denial in the answer, bearing on the allegation of the bill that the "sum of \$7 per acre is a reasonable rate for consumers to pay, and the smallest amount for which said company can furnish the water without loss to it." (Trans. p. 11). The general scope of such parts of the answer, in addition to those involved in the contractual, statutory and constitutional considerations, just referred to are, among others; averments of the actual value of the system (Trans

p. 29), of its total irrigating capacity, of the proportion of the same not used and held by the corporation for speculation in connection with its lands for sale; averments of the accumulation from the then existing rates for the portion of the system actually used of a large surplus of money in excess of all expenses for management, operation and maintenance of the system. (Trans. p. 26); of denial that any increase of the annual rate of \$3.50 per acre is at all necessary to enable the corporation to maintain and operate its water system, or to save the corporation from loss, or the plant from decay; also of averment going to show that the amount of the increase of rate in controversy between any defendant severally interested, or between any defendants jointly interested and the corporation was, and is, far below \$2,000, as relating to the jurisdiction.

The second, third, fourth, fifth and sixth exceptions are as follows:

Second. That the defendants by their said answer aver and claim that they have by purchasing lands from the said San Diego Land & Town Company, and by the purchase of water rights from said Company, returned to it a part of its principal invested in its said water works, and that therefore they should not be required to pay rates upon a basis of allowing to said Company any interest on the amount of principal so advanced or returned to it, but said answer is evasive and uncertain, for that it does not show which, if any, of said defendants have so paid or advanced any of the

said principal, or how much thereof, if any, has been paid or returned to said Company by all of said defendants.

Third. That it is admitted by said answer that the actual and just cost of the water works and system of said San Diego Land & Town Company is \$750,000.00, and the law of the State of California allows said Company, as a reasonable return on said investment, the sum of not less than six nor more than ten per cent net on the said value of said plant and system, and it affirmatively appears from said answer that the annual rental of \$7.00 per acre, per annum, will not, and cannot, realize to said Company said sum of six per cent net per annum, allowed it by law.

Fourth. That with respect to all of the matters and things in said answer set forth, other than the allegations hereinabove set forth as irrelevant and impertinent, the denials and averments contained in said answer are evasive, imperfect and insufficient, and fail, either separately or as a whole, to show that the matters and things set forth in the bill of complaint are not true.

Fifth. That it appears affirmatively from the answer of the defendants that the complainant has legally established and is entitled to collect a water rental of \$7.00 per acre, per annum, for the irrigation of the lands of the defendants and each of them respectively, and that it is entitled to collect said amount as alleged in the bill of complaint herein, unless said

rate is unreasonable; and it is further shown, and appears from said answer, that the defendants have no standing in this court, to contest the reasonableness of said rates, but that their remedy, if any they have, is to apply to the Board of Supervisors of the county in which their said land is situated to fix and establish said rates.

Sixth. That the said answer shows on its face that the complainant is legally and equitably entitled to charge and collect the rate of \$7 per acre for the irrigation of the lands of the defendants, and that said rate is reasonable and just.

On Nov. 22, 1897, the court made a general and sweeping order sustaining such exceptions *en bloc*. (Trans. p. 61.)

#### **ORDER SUBSTITUTING COMPLAINANT.**

On November 16, 1897, the complainant, Lanning, served notice upon the defendants of motion for the discharge of himself as Receiver of the San Diego Land & Town Company of Kansas, and that the San Diego Land & Town Company of Maine be substituted as complainant in the suit in lieu of such Receiver, on the ground that all the property described in the bill had been sold by such Receiver to the Maine corporation, that the price had been received, the Receivership settled and closed, and that the Maine corporation had acquired all the right and title of the Kansas corporation to all of the property, and because the only party interested in the further liti-

gation of the question involved in this suit. (Trans. pp. 60-61.)

On December 6, 1897, the court made an order granting the motion and ordering that "the San Diego Land & Town Company of Maine be, and hereby is, substituted as complainant in said suit in lieu of the complainant (Lanning Receiver) above named"; to which ruling the record states, the defendants by their counsel asked and were allowed an exception. (Trans. pp. 61-62.)

#### **ORDER THAT BILL BE TAKEN PRO-CONFESSO.**

On the 20th day of December, 1897, the San Diego Land & Town Company of Maine served notice upon the defendants of a motion that the bill in the suit be taken *pro confesso* on the ground that defendants had not filed an amended answer within the time allowed.

On January 3rd, 1898, the defendants not having further answered, it was ordered that the bill be taken *pro confesso* against all the defendants.

#### **DECREE**

On February 12, 1898, without proofs, the court entered its decree in favor of the San Diego Land & Town Company of Maine, substituted as complainant in place of Lanning as Receiver, of the Kansas corporation, perpetually enjoining the defendants from prosecuting in the State courts or elsewhere separate actions against the San Diego Land & Town Company of Maine, to prevent it from collecting or enforce-

ing the collection of the rate of \$7.00 per acre, per annum, for the irrigation of the lands of said defendants, fixed and established by the San Diego Land & Town Company (of Kansas) and by Charles D. Lanning, Receiver, as in the bill set forth until the establishment of rates by the Board of Supervisors of the County of San Diego, of the State of California, or the re-establishment thereof in accordance with law.

It was further decreed, that the Kansas corporation, and its Receiver, had the right to increase the amount of water rentals of the Company for water furnished to the lands of the defendants from \$3.50 per acre, per annum, to \$7 per acre, per annum; and that the defendants be required to pay the \$7 rate for their lands irrigated from and after January 1, 1896, until the fixing of rates by such Board of Supervisors, or the re-establishment thereof, in accordance with law, as a condition upon which water should be furnished them, and that upon failure of the defendants or any of them to pay said rates, such substituted complainant was authorized to shut off the supply of water to such or any of the defendants who should fail for five days to make such payment, provided that the furnishing of water to the defendants for other purposes be not thereby interfered with; the decree also gave costs against the defendants. (Trans. p. 64.)

#### **OBEDIENCE TO AND PERFORMANCE OF DECREE.**

The bill of review alleges payment of the cost and obedience to and performance of the decree. It as-

signs errors in the proceedings and decree which are covered by the assignments of error annexed to the petition on appeal and the specification of errors set out in this brief.

#### DEMURRER.

To the bill of review of the San Diego Land & Town Company of Maine, on November 26th, 1898, filed a demurrer (fols. 138-39) alleging the following grounds:

"1. That it appears by the complainants' own showing in said bill that there is and was no error in the proceeding or decision of said court in the case of Charles D. Lanning, receiver of the San Diego Land & Town Company, vs. H. C. Osborne, mentioned and set forth in the bill herein, appearing on the face of the record or otherwise.

"2. That it appears from the complainants' own showing in their said bill that they are not nor are any of them entitled to the relief prayed for in their said bill or any relief.

"3. That it appears from their own showing by their said bill that there is no such error appearing on the face of the proceedings in the said suit of Lanning, receiver, vs. H. C. Osborne et al., or otherwise as can be delieved against by bill of review or a bill in the nature of a bill of review.

"4. That it appears from the complainants' own showing by their said bill that the remedy of the complainants, if any they have, is by appeal and not by bill of review."

The demurrer was by the court sustained on November 28th, 1898.

**DECREE.**

On the 5th of December, 1898, final decree was entered dismissing the bill with costs (fols. 147-152.)

**APPEAL.**

On the same day, to-wit, December 5th, 1898, the defendants filed their petition on appeal with assignments of error and the appeal to this court was allowed and thereafter perfected.

The decree in the original cause recites (fol. 102):

"That the complainant, San Diego Land & Town Company of Maine, is entitled to a final decree against said defendants in conformity to the opinion of the court filed herein September 14, 1896." (See 76 Fed. Rep. 319).

**ULTIMATE QUESTIONS UPON THE MERITS.**

The ultimate questions upon the merits, presented by the record upon this appeal are:

1. Is the original decree entered in form *pro confesso* manifestly erroneous, because not warranted under the statute law, by the allegations of the original bill?

Or more concretely—Upon the face of the original bill, was the rate of \$3.50 per acre, per annum, for water supplied to defendants for irrigation, by the corporation, to be "deemed and accepted as the legally established rate thereof", under the proper construction of Sections 5 and 8 of the Act of the State Legislature



of March 12, 1885, instead of the rate of \$7.00 per acre, per annum, as decreed?

2. Were the allegations of the answer which were expunged on exceptions for impertinence, material and pertinent in so far as they set forth contracts either express, or tacit and implied, for the creation of the respective irrigation water-rights, easements and servitudes claimed by defendants; and in so far as they set forth contracts, either express, or tacit and implied, fixing the annual rate for water furnished under such easements at \$3.50 per acre; and was it error for the court to sustain such exceptions and thereupon to proceed to make its decree *pro confesso*?

And as germane to this question:—

Do the Constitution and statutes of the State of California forbid such alleged contracts?

And if they do forbid such alleged contracts, are such state laws in conflict with the Fourteenth Amendment and with Article 4, Section 4 of the Federal Constitution; and is the decree in conflict with the Fifth and Fourteenth Amendments and with Art. 4, Sec. 4 of the Constitution?

3. If under the laws of the state, and notwithstanding the alleged contract rights of the defendants, and under the other circumstances set forth in the record, it was competent for the corporation and its receiver to supersede the \$3.50 rate, and establish any higher rate, was the order, sustaining the first and fifth ex-



# TRANSCRIPT OF RECORD.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1899.

No. 201.

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H. C. OSBORNE, WILLIAM KNAPP, A. BARBER, ET AL.  
APPELLANTS,

*vs.*

THE SAN DIEGO LAND AND TOWN COMPANY OF  
MAINE.

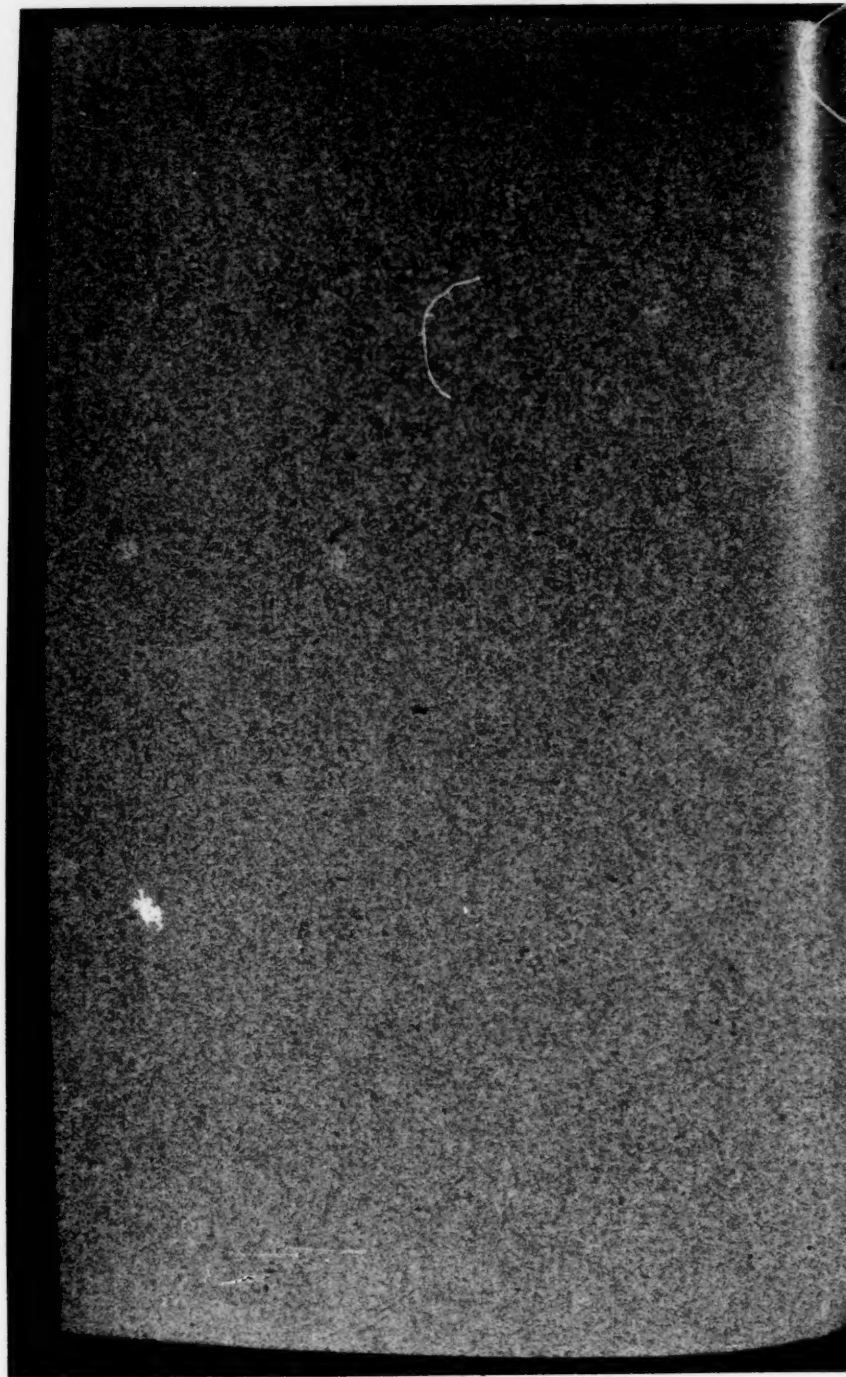
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APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR  
THE SOUTHERN DISTRICT OF CALIFORNIA.

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FILED JANUARY 30, 1899.

(17,286.)



(17,286.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1899.

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H. C. OSBORNE, WILLIAM KNAPP, A. BARBER, ET AL.,  
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*a* UNITED STATES OF AMERICA, 88 :

To San Diego Land & Town Company of Maine, Greeting :

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be held at the city of Washington, in the District of Columbia, on the 1st day of February, A. D. 1899, pursuant to an order allowing an appeal entered in the clerk's office of the circuit court of the United States of America of the ninth judicial circuit in and for the southern district of California from a final decree made and entered on the 5th day of December, 1898, in that certain cause being in equity, No. 839, wherein H. C. Osborne, William Knapp, A. Barber, Mrs. E. L. Williams, T. M. Eaton, J. M. Davidson, A. J. Smith, A. Hammond, John T. Judkins, Henry Gulick, Sr., H. S. Whittaker, A. Barnett, J. N. Woodward, A. B. Stephens, John Nickson, J. H. Fawcett, Payne Brown, W. E. Montgomery, Monroe Johnson, A. Haines, M. L. Ward, Ella B. Ward, A. Keene, Fred Keene, E. K. Earle, H. F. Earle, Thomas Walker, A. G. White, W. J. Brower, P. B. Smith, F. B. Merrian, H. Hyatt, H. Stegeman, R. S. Harris, A. A. Gooden, G. A. Dukes, C. H. Rippey, Virginia Rippey, C. C. Jobs, J. L. Griffin, Tallie Spencer Sullivan, W. C. Kimball, J. C. Frisbie, S. W. Morgan, George Hannals, F. B. Webb, John Haberfellner, W. S. Wilkins, S. W. Haines, Chula Vista School District, S. Healey, M. E. Phinney, D. L. Murdock, Dan. P. Stetzelberger, R. P. Middlebrook, Anson Titus, W. A. Henry, J. W. Preston, W. E. Ballinger, J. H. Blakeslee, Herman Banke, J. C. Alles, D. K. Adams, A. J. Morley, C. F. Wiggins, S. F. Dickinson, O. C. Noyes, J. E. Clouse, Peter Morse, E. W. Dyer, Parsons Shaw, A. C. Crockett, E. E. Flanders, Elisha M. Gavin, Stephen Sheffield, C. A. Whittemore, F. Gardner, Charles Monnike, Carl Reinisch, David K. Horton, George Henninger, J. M. Cook, O. H. P. Forker, I. N. Lamson, George D. Hayes, A. A. Groat, R. H. Longshare, J. G. Shaw, Julian Field, C. E. Foss, Otto Sollner, A. B. Story, L. E. Allen, C. F. Chadwick, A. R. Schulenburg, James W. Jackson, John H. Ferry, Frank W. Hedges, A. V. Bills, C. L. Barber, A. J. Stokes, T. E. Walker, A. J. Grainger, E. P. Hammack, Wah Hong, Edward Gulick and William Gulick and Henry Gulick, partners, doing business under the firm name of Gulick Brothers; John J. Jones, Wm. D. Webber, W. F. Stearns, W. J. Henderson, P. W. Morse, O. Darling, S. J. Bradt, R. W. Vaughan, E. J. Elliott, M. E. Jennings Verity, J. E. Stephens, R. G. Wallace, George H. Hancock, Frank Howe, I. N. Morse, Emil O. Hoeb, C. S. Johnson, J. H. Clough, George L. Henderson, M. Cox, John Johnson, A. T. Burr, A. M. Jameson, H. E. Klammer, J. H. Dean, P. S. Leisenring, J. M. Johnson, Ah Quinn, Ah Lit, J. M. Ballou, S. H. Dale, George M. Tutton, E. P. Lounsbury, George W. De Tar, S. D. Foss, Austin Carey, George J. Jecock, D. S. McBean, Quincy A. Petts, Morton Penfield, J. A. Thomas, J. O. Reinhart, William Doyie, F. O. Reinhart, H. I. Atwater, E. H. Woods, N. H. Downs, Edwin S. Belcher, W. G. Terril, T. G. Ellis, W. M. Carr, D. F. Garrettson and Elisabeth A. Garrettson, executors of the estate of G. A. Garrett-

son, deceased; George M. Darnell, Flora B. Arndt, J. W. Stearns, P. W. Beck, M. G. Miller, J. F. Morrill, Fred W. Pearson, Sunnyside School District, N. J. Pillsbury, Julia Latta, Mary R. Klammer, Thomas Lindsay, E. P. Carr, I. M. Howe and H. B. Howe, partners, doing business under the firm name of Howe Brothers; Arthur Ryan and Michael Mack, partners, doing business under the firm name of Ryan and Mack; James H. Forbes, J. A. Pinkerton, S. D. Murdock, W. Weitekamp, John L. Davis, George H. Eaton, George Rippe, J. H. Greife, F. W. Reid, R. S. Harris, Sweetwater School District, L. W. Goff, George Dashbaugh, Henry Walker, C. C. Hughes, Frank A. Kimball, Henry Haberfellner, F. Mederle, L. C. Wright, Cyrus Johnson, A. W. Howard, Laura F. Meyer, George F. McMurry, F. H. Downes, N. W. Downes are complainants and appellants and you are defendant and appellee, to show cause, if any there be, why the said decree rendered against said appellants, as in the said order allowing the appeal mentioned, should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Erskine M. Ross, United States circuit judge for the ninth circuit, this 20th day of January, A. D. 1899, and of the Independence of the United States the one hundred and twenty-third.

Jan'y 20, 1899.

ERSKINE M. ROSS,

*United States Circuit Judge for the Ninth Circuit.*

d [Endorsed:] In the Supreme Court of the United States.

H. C. Osborne *et al.*, appellants, vs. San Diego Land & Town Company of Maine, appellee. Citation. Service of the within citation is hereby acknowledged this 20th day of January, 1899. Works & Works, solicitors for complainant and appellee. Filed Jan. 20, 1899. Wm. M. Van Dyke, clerk. — — —, deputy.

1 In the Circuit Court of the United States of America of the Ninth Judicial Circuit in and for the Southern District of California.

No. 839.

H. C. OSBORNE, WILLIAM KNAPP, A. BARBER, MRS. E. L. WILLIAMS, T. M. Eaton, J. M. Davidson, A. J. Smith, A. Hammond, John T. Judkins, Henry Gulick, Sr.; H. S. Whittaker, A. Barnett, J. N. Woodward, A. B. Stephens, John Nickson, J. H. Fawcett, Payne Brown, W. E. Montgomery, Monroe Johnson, A. Haines, M. L. Ward, Ella B. Ward, A. Keene, Fred Keene, E. K. Earle, H. F. Earle, Thomas Walker, A. G. White, W. J. Brower, P. B. Smith, F. B. Merriam, H. Hyatt, H. Stegeman, R. S. Harris, A. A. Gooden, G. A. Dukes, C. H. Rippey, Virginia Rippey, C. C. Jobes, J. L. Griffin, Tallie Spencer Sullivan, W. C. Kimball, J. C. Frisbie, S. W. Morgan, George Hannahs, F. B. Webb, John Haberfellner, W. S. Wilkins, S. W. Haines, Chula Vista School District, S. Healey, M. E. Phinney, D. L. Murdock, Dan. P. Stetzelberger.

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vs.

SAN DIEGO LAND &amp; TOWN COMPANY OF MAINE, Defendant.

3 In the Circuit Court of the United States, Ninth Circuit,  
Southern District of California.

No. 839.

- H. C. OSBORNE, WILLIAM KNAPP, A. BARBER, MRS. E. L. WILLIAMS, T. M. Eaton, J. M. Davidson, A. J. Smith, A. Hammond, John T. Judkins, Henry Gulick, Sr., H. S. Whittaker, A. Barnett, J. N. Woodward, A. B. Stephens, John Nickson, J. H. Fawcett, Payne Brown, W. E. Montgomery, Monroe Johnson, A. Haines, M. L. Ward, Ella B. Ward, A. Keene, Fred Keene, E. K. Earle, H. F. Earle, Thomas Walker, A. G. White, W. J. Brower, P. B. Smith, F. B. Merriam, H. Hyatt, H. Stegeman, R. S. Harris, A. A. Gooden, G. A. Dukes, C. H. Rippey, Virginia Rippey, C. C. Jobs, J. L. Griffin, Tallie Spencer Sullivan, W. C. Kimball, J. C. Frisbie, S. W. Morgan, George Hannahs, F. B. Webb, John Haberfellner, W. S. Wilkins, S. W. Haines, Chula Vista School District, S. Healey, M. E. Phinney, D. L. Murdock, Dan. P. Stetzelberger, R. P. Middlebrook, Anson Titus, W. A. Henry, J. W. Preston, W. E. Ballinger, J. H. Blakeslee, Herman Banke, J. C. Alles, D. K. Adams, A. J. Morley, C. F. Wiggins, S. F. Dickinson, O. C. Noyes, J. E. Clouse, Peter Morse, E. W. Dyer, Parsons Shaw, A. C. Crockett, E. E. Flanders, Elisha M. Gavin, Stephen Sheffield, C. A. Whittemore, F. Gardner, Charles Monnike, Carl Reinisch, David K. Horton, George Henninger, J. M. Cook, O. H. P. Forker, I. N. Lamson, George D. Hayes, A. A. Groat, R. H. Longshare, J. G. Shaw, Julian Field, C. E. Foss, Otto Sollner, A. B. Story, L. E. Allen, C. F. Chadwick, A. R. Schulenburg, James W. Jackson, John H. Ferry, Frank W. Hedges, A. V. Bills, C. L. Barber, A. J. Stokes, T. E. Walker, A. J. Grainger, E. P. Hammack, Wah Hong, Edward Gulick and William Gulick and Henry Gulick, Partners, Doing Business under the Firm Name of Gulick Brothers; John J. Jones, Wm. D. Webber, W. F. Stearns, W. J. Henderson, P. W. Morse, O. Darling, S. J. Bradt, R. W. Vaughan, E. J. Elliott, M. E. Jennings Verity, J. E. Stephens, R. G. Wallace, George H. Hancock, Frank Howe, I. N. Morse, Emil O. Hoeh, C. S. Johnson, J. H. Clough, George L. Henderson, M. Cox, John Johnson, A. T. Burr, A. M. Jameson, H. E. Klammer, J. H. Dean, P. S. Leisenring, J. M. Johnson, Ah Quim, Ah Lit, J. M. Ballou, S. H. Dale, George M. Tutton, E. P. Lounsbury, George W. De Tar, S. D. Foss, Austin Carey, George J. Jecock, D. S. McBean, Quincy A. Petts, Morton Penfield, J. A. Thomas, J. O. Reinhart, William Doyle, F. O. Reinhart, H. I. Atwater, E. H. Woods, N. H. Downs, Edwin S. Belcher, W. G. Terril, T. G. Ellis, W. M. Carr, D. F. Garrettson and Elisabeth A. Garrettson, Executors of the Estate of G. A. Garrettson, Deceased; George M. Darnell, Flora B. Arndt, J. W. Stearns, P. W. Beck, M. G. Miller, J. F. Morrill, Fred W. Pearson, Sunnyside School District, N. J. Pillsbury, Julia Latta, Mary R. Klammer, Thomas Lindsay, E. P. Carr, I. M. Howe and H. B. Howe, Partners, Doing Business under the Firm Name of Howe Brothers; Arthur Ryan and Michael Mack, Partners, Doing Business under

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vs.

SAN DIEGO LAND & TOWN COMPANY OF MAINE, Defendant.

*Bill in Equity.*

To the honorable the judges of the circuit court of the United States within and for the southern district of California, sitting in equity:

5 Humbly complaining, show unto your honors your orators,  
H. C. Osborne, William Knapp, A. Barber, E. L. Williams, T. M. Eaton, J. M. Davidson, A. J. Smith, A. Hammond, John T. Judkins, Henry Gulick, Sr.; H. S. Whittaker, A. Barnett, J. N. Woodward, A. B. Stephens, John Nickson, J. H. Fawcett, Payne Brown, W. E. Montgomery, Monroe Johnson, A. Haines, M. L. Ward, Ella B. Ward, A. Keene, Fred Keene, E. K. Earle, H. F. Earle, Thomas Walker, A. G. White, W. J. Brower, P. B. Smith, F. B. Merriam, H. Hyatt, H. Stegeman, R. S. Harris, A. A. Gooden, G. A. Dukes, C. H. Rippey, Virginia Rippey, C. C. Jobes, J. L. Griffin, Tallie Spencer Sullivan, W. C. Kimball, J. C. Frisbie, S. W. Morgan, George Hannahs, Charles O. Brown, F. B. Webb, John Haberfellner, W. S. Wilkins, S. W. Haines, Chula Vista School District, S. Healey, M. E. Phinney, D. L. Murdock, Dan. P. Stetzelberger, R. P. Middlebrook, Anson Titus, W. A. Henry, J. W. Preston, W. E. Ballinger, J. H. Blakeslee, Herman Banke, J. C. Ailes, D. K. Adams, A. J. Morley, C. F. Wiggins, S. F. Dickinson, O. C. Noyes, J. E. Clouse, Peter Morse, E. W. Dyer, Parsons Shaw, A. C. Crockett, E. E. Flanders, Elisha M. Gavin, Stephen Sheffield, C. A. Whittemore, F. Gardner, Charles Mohlnike Carl Reinisch, David K. Horton, George Henninger, J. M. Cook, O. H. P. Forker, I. N. Lamson, George D. Hayes, A. A. Grout, J. H. Bowen, R. H. Longshare, W. O. Bowen, J. G. Shaw, Julian Field, C. E. Foss, Otto Solner, A. B. Story, L. E. Allen, C. F. Chadwick, A. R. Schulenberg, James W. Jackson, John H. Ferry, Frank W. Hedges, A. V. Bills, C. L. Barber, A. J. Stokes, T. E. Walker, A. J. Grainger, E. P. Hammack, Wah Hong, Edward Gulick and William Gulick and Henry Gulick, partners, doing business under the firm name of Gulick Brothers; John J. Jones, Wm. D. Webber, W. F. Stearns, W. J. Henderson, P. W. Morse, O. Darling, S. J. Bradt, R. W. Vaughan, F. A. Moses, E. J. Elliott, M. E. Jennings Verity, J. E. Stephens, R. G. Wallace, George H. Hancock, Frank Howe, I. N. Morse, Emil O. Hoch,  
6 C. S. Johnson, C. W. Ellsworth, J. H. Clough, George L. Henderson, M. Cox, John Johnson, A. T. Burr, A. M. Jamieson, H. E. Klammer, J. H. Dean, P. S. Leisenring, J. M. Johnson

Ah Quin, Ah Lit, J. M. Ballou, S. H. Dale, George M. Tutton, E. P. Lounsbury, George W. De Tar, S. D. Foss, Austin Carey, George J. Jecock, D. S. McBean, Quincy A. Pettis, Morton Penfield, J. A. Thomas, J. O. Rhinehart, William Doyle, F. O. Rhinehart, H. I. Atwater, E. H. Woods, N. H. Downs, Edwin S. Belcher, W. G. Terrill, T. G. Ellis, W. M. Carr, D. F. Garrettson and Elizabeth A. Garrettson, executors of the estate of G. A. Garrettson, deceased; George M. Darnell, Flora B. Arndt, J. W. Stearns, P. W. Beck, M. G. Miller, J. F. Morrill, Fred W. Pearson, Sunnyside School District, N. J. Pillsbury, Julia Latta, Mary R. Klamer, Thomas Lindsay, E. P. Carr, I. M. Howe and H. B. Howe, partners, doing business under the firm name of Howe Brothers; Arthur Ryan and Michael Mack, partners, doing business under the firm name of Ryan & Mack; James H. Forbes, J. A. Pinkerton, S. D. Murdock, W. Weitekamp, John L. Davis, George H. Eaton, George Rippe, J. H. Greife, F. W. Reid, R. S. Harris, Sweetwater School District, L. W. Goff, George Dashbaugh, William Campbell, Henry Walker, C. C. Hughes, Frank A. Kimball, Henry Haberfellner, F. Mederle, L. C. Wright, Cyrus Johnson, A. W. Howard, Laura F. Meyer, George F. McMurry, F. H. Downs, N. W. Downs, and residents and citizens of the county of San Diego, in the State of California, and in the district aforesaid:

That on the 6th day of January, 1896, Chas. D. Lanning, as receiver of the San Diego Land & Town Company, a corporation organized under the laws of the State of Kansas, hereinafter named, exhibited his bill of complaint in this honorable court against your orators and thereby set forth in words and figures the following, to wit:

*"Bill in Equity.*

To the honorable the judges of the circuit court of the United States within and for the southern district of California,  
7      sitting in equity:

Charles D. Lanning, a resident and citizen of the State of Massachusetts, receiver of the San Diego Land & Town Company, a corporation duly organized and existing under and by virtue of the laws of the State of Kansas, and a resident and citizen of said State, brings this his bill against H. C. Osborne, William Knapp, A. Barber, E. L. Williams, T. M. Eaton, J. M. Davidson, A. J. Smith, A. Hammond, John T. Judkins, Henry Gulick, Sr., H. S. Whittaker, A. Barnett, J. S. Woodward, A. B. Stephens, John Nickson, J. H. Fawcett, Payne Brown, W. E. Montgomery, Monroe Johnson, A. Haines, M. L. Ward, Ella B. Ward, A. Keene, Fred Keene, E. K. Earle, H. F. Earle, Thomas Walker, A. G. White, W. J. Brower, P. B. Smith, F. B. Merriam, H. Hyatt, H. Stegeman, R. S. Harris, A. A. Gooden, G. A. Dukes, C. H. Rippey, Virginia Rippey, C. C. Jones, J. L. Griffin, Tallie Spencer Sullivan, W. C. Kimball, J. C. Frisbie, S. W. Morgan, George Hannahs, Charles O. Brown, F. B. Webb, John Haberfellner, W. S. Wilkins, S. W. Haines, Chula Vista School District, S. Healey, M. E. Phinney, D. L. Murdock, Dan. P. Stetzel-

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And your orator complains and says that the San Diego Land & Town Company is and was at all times herein mentioned a corporation duly organized and existing under and by virtue of the laws of the State of Kansas and doing business in the State of  
 9 California.

That the said company is and has been during said times



the owner of valuable water, water rights, reservoirs, and an entire water system for furnishing water to consumers for domestic irrigation and other purposes for which water is needed for consumption and of a franchise for the impounding, sale, disposition, and distribution of the waters owned and stored by it to the defendants and other consumers and to the city of National City and its inhabitants.

That its main reservoir and supply of water is and was at the times hereinafter mentioned situate in the Sweetwater river, so called, a small stream in the said county of San Diego, about five miles distant from the city of National City, and its system of reservoir, mains, flumes, aqueducts, and pipes covers and can supply but a limited amount of territory, consisting of certain farming lands within and outside of said National City and in part of the residence portion of said city of National City.

That your orator was on the 4th day of September, 1895, by an order and decree of the circuit court of the United States for the district of Massachusetts, duly made and entered, appointed receiver of all of the property of the San Diego Land & Town Company, with full power to take possession of and manage, operate, and control all of its said property, including the plant and water system in this bill mentioned, and that by an order and decree of this court, duly made and entered on the 30th day of September, 1895, the said first named order and decree was duly confirmed as to all property of said company within the jurisdiction of this court, including said water plant and system, and your orator was by said last-named order duly appointed receiver of said property, with full power and authority to manage and control the same, and,

by virtue of said orders and decrees, your orator took possession of and is managing said property as such receiver.

That the said company has, in procuring the water and water rights, reservoirs, and distributing system owned by it, as aforesaid, and preparing itself to supply consumers with water, expended, up to January 1, 1896, the sum of one million twenty-two thousand four hundred seventy-three and  $\frac{54}{100}$  dollars (\$1,022,473.54), which was reasonably necessary for said purposes.

That by the expenditure of said large sum said company has procured and owns, subject to the public use and the regulation thereof by law, water, water rights, a reservoir site, and a reservoir of the capacity of six thousand million gallons of water, and has constructed and laid therefrom its water mains necessary to supply the defendants and their lands, hereinafter mentioned, and the said city of National City and its inhabitants with water, and has constructed and put in mains, pipes, and all other things necessary to connect said water supply with the premises and buildings of the defendants and each of them and with the premises and buildings of said city and its inhabitants and to furnish them and each of them with water, and was at the time hereinafter mentioned furnishing them and each of them with water.

Your orator further shows that the defendants herein are the owners, respectively, of tracts of land under the system of said



land & town company, most of said defendants owning and holding small tracts of only a few acres each.

That each of said defendants has, by purchase or otherwise, become the owner of a water right—to a part of the water appropriated and stored by said company necessary to irrigate his tract of land—and is liable to pay for the use of said water yearly rental such as said company is entitled to charge and collect.

That the annual expense of operating and keeping in repair the said reservoir and water system of said company and furnishing said consumers with water is, including interest on its bonds and excluding the natural and necessary depreciation of its system, \$33,034.99.

That in order to pay the said company the amount of its annual expenses and income of six per cent. on the amount actually invested in its said water, water rights, and water system up to the first day of January, 1896, it is necessary that such rates for water sold and consumed be so fixed as to realize to the said company the sum of one hundred nineteen thousand seven hundred ninety-one and  $\frac{1}{100}$  dollars (\$119,791.66).

That the total amount that was realized by the said company from sales of water and water rights and from all other sources on account of its business of supplying water to consumers, as aforesaid, outside of the said city of National City for the year ending January 1st, 1896, was about fifteen thousand dollars (\$15,000.00), and no more than that sum can probably be realized for the year ending January 1st, 1897, at the rates now prevailing.

That all of the mains and pipes of the said company and other parts of its property so used in furnishing water to consumers are perishable property and require to be replaced at least once in sixteen years and require frequent repairs.

That in order to acquire said water and water rights and construct its said system of water works said company was compelled to and did borrow large sums of money, to wit, three hundred thousand dollars (\$300,000.00), and it is compelled to pay as interest thereon the sum of twenty-one thousand dollars (\$21,000.00) annually, which sum must be realized from the sale of its water and is a part of its operating expenses; that the proportionate share of the revenue of the said company that should be raised by water rates within the limits of said National City, as compared with the revenues that should be raised and paid as water rates by consumers outside of said city, is about one-third.

12 That the amount that can be realized from said city and its inhabitants per annum from the rates now prevailing under the ordinance hereinafter mentioned is about ten thousand seven hundred and fifteen dollars (\$10,715.00) per annum and no more.

That the value of the water, water rights, reservoirs, franchises, and property necessary for the proper operation of its business and now owned by said company is one million one hundred thousand dollars (\$1,100,000.00), and the same is necessary for the use of the

said company in furnishing water to said defendants and other consumers.

That no other person or corporation is or ever has been furnishing a supply of water to said defendants and other consumers, nor is there now nor has there been any other system of water works by which said defendant can be furnished with water, but the franchise and right of the company to furnish water to said consumers is not exclusive of other persons or corporations.

That the said city of National City is a municipal corporation of the sixth class organized under the general laws of the State of California, and the rates to be charged for water within said city are fixed by the board of trustees of said city, as provided by the laws of the State of California; that on the 20th day of February, 1895, the said board of trustees, assuming and claiming to act under and in accordance with the constitution and laws of said State, passed and adopted an ordinance of said city fixing the water rates to be charged for water sold and furnished by said company to consumers within said city.

Your orator further shows to your honors that said land & town company commenced to furnish water to consumers in the year 1787; that it was informed by its engineer that its system and the supply of water that could be stored thereby would furnish water to consumers sufficient to irrigate twenty thousand acres of land

and supply such water, in addition thereto, as would be necessary for domestic use inside and outside of said city of

13 National City; that the company was then unfamiliar with the operation of a plant and system of the kind constructed by it, and did not know what the cost of operating and maintaining the same would be; that, relying upon the said report and estimate of its engineer as to the probable duty of its reservoir and the capacity of its said system and believing that by fixing and charging an annual rate of \$3.50 per acre for irrigation it could meet its operating expenses and pay it some interest on its investment, it fixed and established and has since charged said rate of \$3.50 per acre per annum and no more until January 1st, 1896; but your orator further shows to your honors that instead of being able to supply from its said system sufficient water to irrigate twenty thousand acres it has been demonstrated by its actual experience that said system will not supply water sufficient to irrigate to exceed seven thousand acres, together with the water demanded for domestic use, and it is believed not to exceed six thousand acres, although there are about ten thousand acres under said system susceptible of irrigation.

And your orator further shows that at the rate of \$3.50 per acre, if water should be demanded and used upon the whole of the lands which the system is able to supply with water and rates are allowed to said National City equally high for domestic use and irrigation, said company would not be able to pay its operating expenses and maintain its plant and system, and that said company has been and still is, under said rates, losing money every year, and its said plant and system has been and is gradually going to decay from natural

depreciation consequent upon its use and supplying consumers with water without any revenue or means being provided for replacing the same, whereby the said system and the money invested by said company therein will be wholly lost to it, and it will, if said rate of \$3.50 per acre is maintained, be compelled to furnish water to consumers at an actual and continual loss.

14 Your orator further shows that in order to pay the cost of operating the plant of said company and maintain the same and pay said company a reasonable interest on its investment in said plant, or a reasonable sum for its services in supplying water to the defendants and other consumers, it will be necessary for it to charge a rate per acre per annum of not less than \$7.00 for irrigation purposes; that said sum of \$7.00 per acre is a reasonable rate for consumers to pay and the smallest amount for which said company can furnish the water without loss to it.

Your orator further shows that by the laws of the State of California the board of supervisors may, upon the petition of twenty-five inhabitants and tax-payers of the county, fix the rates of yearly rental to be collected by any company furnishing water to consumers, but no such petition has ever been presented or rates fixed in the case of the said land & town company.

Your orator further shows that for the reasons above stated said land & town company gave notice to the defendants that on January 1st, 1896, it would establish a rental of \$7.00 per acre per annum for water supplied to their and each of their lands for irrigation, and that from and after said date they and each of them would be required to pay said sum for the irrigation of their and each of their lands, and your orator, after his appointment as receiver, as aforesaid, and before said date, gave a similar notice.

Your orator further shows that the said defendants and each of them have refused to pay said rate of \$7.00 per acre, and maintain that neither the said land & town company nor your orator, as receiver thereof, have any legal right to increase the amount of rental to be paid by them or any of them, and that the rate of \$3.50 established and collected by the said land & town company must be and remain the established rate of rental until a rate

15 is established by the board of supervisors of the county in which said plant is situated, as provided by law.

Your orator further shows that an increase of the rate for such rentals is absolutely necessary to enable him to maintain and operate said plant and pay the expenses of such maintenance and operation as he is required by law to do.

And your orator further shows that in order to enforce the payment of said rentals he has, as he is authorized by law to do, caused the water to be shut off from the premises of the defendants and each of them until such rentals are paid, and said defendants threaten to and will, unless restrained from so doing by this court, commence suits in the superior court of the county of San Diego, State of California, to compel your orator to turn on and furnish water to their said lands without the payment of \$7.00 per acre rental on the ground that they are entitled to the use of said water for \$3.50 per

acre, the rate heretofore prevailing, and for damages for cutting off their said supply of water; that the rights of said defendants are the same, and the determination of the question of the right of said land & town company and of your orator to increase the rate of rental to be charged and collected will affect all of the said defendants in the same way and to the same extent, except that the quantity of land owned by the several defendants is different.

And your orator further shows to your honors that the bringing of said suits by said defendants separately will involve the said land & town company, your orator, and said defendants in a multiplicity of suit- and put them and each of them to great and unnecessary cost and expense, and will seriously hinder your orator in the proper operation and management of the property of said company and the settlement of its outstanding debts, liabilities, and obligations, when all of the questions involved in such litigation and the rights  
 16 of all of the parties in interest can be better settled and determined in one suit, and vexatious litigation and unnecessary expense and unnecessary interference with your orator's management and control of the property and business of said company be thereby avoided.

Your orator further shows that the proposed increase in rates will add to the revenue and earnings of said company from the sale and distribution of the water from its said system, with the amount of land now under irrigation, not less than \$14,000.00 per annum, and upon the whole of the lands that can be irrigated by the system of the company of not less than \$21,000.00 per annum.

Your orator further shows that, as he is informed and believes, the defendants Chula Vista School District, Sunnyside School District, and Sweetwater School District are corporations duly organized and existing under the laws of the State of California; the defendants Edward Gulick, William Gulick, and Henry Gulick are partners, doing business under the copartnership name of Gulick Brothers; the defendants D. F. Garrettson and Elizabeth A. Garrettson were, on the 5th day of September, 1895, by an order of the superior court of the county of San Diego, State of California, duly made and entered, appointed executors of the estate of G. A. Garrettson, deceased, and duly qualified as such executors and are now acting as such; the defendants I. M. Howe and H. B. Howe are partners, doing business under the copartnership name of Howe Brothers; the defendants Arthur Ryan and Michael Mack are partners, doing business under the copartnership name of Ryan and Mack, and the defendants F. E. Leslie and H. P. Whitney are partners, doing business under the firm name of Leslie & Whitney.

Wherefore your orator prays your honors to grant to him the writ of injunction against the defendants and each of them, enjoining them from prosecuting in the State courts or elsewhere separate actions against your orator or said land & town company; that  
 17 said defendants and each of them be required to appear in this suit and set up any claims they may have against the right of your orator or said company to increase the rental for water furnished by said company, as aforesaid, and that it be

finally decreed by this court that your orator, as such receiver, and said company have the right to increase the amount of its rentals to any reasonable sum, and that the sum of \$7.00 per acre per annum is a reasonable rental to be charged, and that the defendants and each of them be required to pay said rate as a condition upon which water shall be furnished to them, and that your orator shall have generally such other and further relief as the nature of his case may require.

Therefore will your honors grant unto your orator the writ of subpoena issuing out of and under the seal of this court, to be directed to said defendants, commanding them and each of them by a certain day and under a certain penalty therein inserted to appear before your honors in the circuit court aforesaid, and then and there answer the premises and abide the order and decree of the court.

WORKS & WORKS,  
*Solicitors for Complainant.*

STATE OF CALIFORNIA, } ss:  
*County of San Diego,*

John E. Boal, being duly sworn, says that he is the agent of the receiver of The San Diego Land & Town Company, complainant in the above-entitled cause; that he has read the foregoing bill in equity and knows the contents thereof; that the same is true of his own knowledge, except as to the matters which are therein stated on information and belief, and as to those matters that he believes it to be true.

JOHN E. BOAL.

Subscribed and sworn to before me this 4th day of January, 1896.

[SEAL.]

LEWIS R. WORKS,  
*Notary Public in and for the County of San Diego,  
State of California."*

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And your orators having appeared in said cause, and having put in an original answer, an amended answer, and a supplemental answer, and the whole of the same having been expunged from the record upon exceptions filed by the said C. D. Lanning, receiver, complainant therein, for irrelevancy and impertinence, and your orators having been directed to make further answer, your orators did, upon the 13th day of September, 1897, put in and file their further answer and supplemental answer to said bill in words and figures following, to wit:

(After title of cause and commencement of answer in the usual form.)

The court having sustained exceptions to the original answer, and to the amended answer, and to the supplemental answer heretofore filed for irrelevancy and impertinence, and having expunged the same, and having also sustained exceptions for insufficiency and directed further answer to be made by the defendants herein, now

these defendants, saving and reserving unto themselves the benefits of all exceptions to the errors and imperfections in the bill contained, for further answer and supplemental answer to so much thereof as they are advised it is necessary or material for them to answer to, do aver and say that—

They admit that the San Diego Land & Town Company is and at all times mentioned in the complaint was a corporation duly organized and existing under and by virtue of the laws of the State of Kansas and doing business in the State of California; and they aver that the corporate powers of said corporation, as declared in its articles of association, are as follows, to wit:

“The purpose- for which this corporation is formed are the encouragement of agriculture and horticulture, the maintenance of public works, the maintenance of a public and private cemetery; the purchase, location and laying out of town sites and  
 19 the sale and conveyance of the same in lots and subdivisions or otherwise; the supply of water to the public; the erection of buildings and the accommodations and loan of funds for the purchase of real property; the establishment and maintenance of a hotel; the promotion of immigration; the construction and maintenance of sewers; the erection and maintenance of market-houses and market places; the construction and maintenance of dams and canals for the purpose of water works, irrigation or manufacturing purposes; the conversion and disposal of agricultural products by means of mills, elevators, markets and stores, or otherwise; the accumulation and loan of funds; the erection of buildings and the purchase and sale of real estate for the benefit of its members. And the construction and maintenance of such other improvements as may be necessary or desirable for the proper exercise of any or all such corporate purposes.”

They deny that said corporation is or at any time was the owner of any water or water rights or reservoir or any water system, as alleged in the bill of complaint, except as hereinafter set forth, or that it is or at any time was the owner of any water or water rights or reservoirs or any water system for or devoted to any purpose except as hereinafter set forth.

They admit and say that said company became, as hereinafter set forth, the owner of a dam, reservoir, and an entire water system, adapted to the furnishing of water for domestic, irrigation, and other purposes for which water is needed for consumption, and of the corporate franchise, as in its said articles of incorporation set forth; and they say that said dam and reservoir are entirely on land, constituting part of the bed of the Sweetwater river, and on riparian land on both sides of said river, contiguous thereto.

That said corporation became the owner in fee-simple of  
 20 the ground occupied by its dam, reservoir, pipe lines, and conduits, and all the real estate occupied by its water system, by private grants to it from the owners thereof by mesne conveyances from the owners of the Mexican grants in said San Diego county, known as the Rancho de la Nacion and the Jamacha rancho; that it acquired the title to all the said land occupied by its reservoir

prior to 1886, except a tract of three hundred and fifty-five acres in the extreme upper end of the reservoir, which it acquired in 1891 by grant to it from George H. Neale and wife, the then owners.

That said Rancho de la Nacion contains 26,631.94 acres of land and has its western boundary on San Diego bay, a navigable water of the Pacific ocean, from whence it extends eastward about seven miles, and that the patent for said rancho was duly issued by the United States Government on February 27th, 1866.

That said Jamacha rancho adjoins said Rancho de la Nacion on the east and contains two square leagues of land; that the said grant was duly confirmed by the district court of the United States for California on March 9th, 1858, and that the United States duly issued a patent conformably thereto.

That the said Sweetwater river flows westerly through said Jamacha rancho, and, pursuing the said course, passes from it into said Rancho de la Nacion, and, flowing nearly through the center of said last-named rancho for about seven miles, has its mouth therein, where it empties into San Diego bay at the western boundary of said last-named rancho.

That on the 9th day of June, 1869, Frank A. Kimball and Warren C. Kimball were and for a long time prior thereto had been the owners in fee of said National rancho, and of all and singular the bed of the said Sweetwater river, and of all the land on each side thereof and contiguous thereto in said Rancho de la Nacion  
21 from the eastern boundary thereof, being also the western boundary of said Jamacha rancho, downward, along, and upon the said Sweetwater river to the place where it empties into the bay of San Diego.

That afterwards, as early as the year 1881, said company acquired title in fee to all the waters then flowing and thereafter to flow in said Sweetwater river in and through said Rancho de la Nacion, with the right to divert the same from its natural channel at any point or points in said rancho, by a regular chain of mesne grants and conveyances under a grant and conveyance of the same made by said Frank A. Kimball and Warren C. Kimball, on said 9th day of June, 1869.

That by reason of the premises the said company became the owner in fee-simple of all the water in and riparian rights on the said Sweetwater river and of the bed of said river from the highest flowage point of its reservoir, in said Jamacha rancho, down to said San Diego bay, and that it acquired such ownership prior to the year 1886, except as to that portion thereof at the extreme upper end of said reservoir, acquired from said Neale and wife in 1891, as aforesaid.

That, pursuant to the provisions of title VIII of the Civil Code of California, said company caused to be posted and recorded in Book One (1) of the Record of Water Claims for San Diego County notices each respectively of the appropriation of 5,000 inches of water of said Sweetwater river at the location of said dam; one of said notices in the month of September, 1886, recorded at page 171; one in the month of September, 1887, recorded at page 178; one in the



month of April, 1887, recorded at page 248; all in said Book One (1).

That each of said notices contained the designation of the purposes for which the said water was claimed in the words following, to wit:

“The purposes for which said undersigned claims said water are to supply for culinary and irrigation purposes the watering  
22 of live stock and other domestic uses to the lands north and south of the Sweetwater river and adjacent thereto.”

That in the month of August, 1888, said company in its own name posted and filed for record a notice of appropriation of 75,000 inches of continuous flow of said Sweetwater river for the purposes set forth in said notice in words following, to wit:

“The purposes for which said water is claimed is to divert *an* and distribute the same through pipes, flumes, ditches for the purpose of irrigation, domestic, manufacturing, and such other uses and purposes as may be practicable and expedient.”

But defendant avers that at the time of the filing and recording of each of said notices of appropriation and of the commencement of the construction of said irrigation system the riparian land on said Sweetwater river and its tributaries and the beds thereof above the reservoir were substantially all in private ownership, and almost none of said riparian land or beds of the streams were public lands of the State of California or the United States.

And defendants say that in November, 1886, the said corporation commenced the construction of its dam to impound and store said water in its said reservoirs, and thereafter prosecuted work upon the same and upon its system of mains and lateral pipes for furnishing said water for use and consumption, and by February, 1888, had completed the same.

That the location of said dam is across the channel of said Sweetwater river, at a point within the boundaries of said Rancho de la Nacion, about one-fourth of a mile west from the eastern boundary thereof, and is so located that the whole reservoir, capable of being filled by the same, is on lands so acquired by said company in said Rancho de la Nacion and Jamacha rancho.

That the capacity of said reservoir is six thousand million gallons, and that the water system of said company covers and can  
23 supply about 9,000 acres of the 12,000 acres of territory thereunder, consisting of certain farming lands within and outside of said National City; and, in addition to supplying said 9,000 acres, can supply the domestic uses and needs of a population, when settled upon said lands within and without said National City and on village property within said city, of 20,000 persons.

And defendants admit that said company has, in acquiring the water rights, reservoir, and distributing system as aforesaid and in preparing itself to supply said water, expended up to January 1st, 1896, a considerable sum of money, but how much they have neither knowledge, information, or belief (and they deny that it is material or relevant that they should answer as to what sums of money were expended for such purposes).



And these defendants say that the right and title of said company to said reservoir and system for furnishing water therefrom to consumers for domestic, irrigation, and other purposes, and of impounding the same, and for the sale and distribution of the waters stored by it, and for collecting rates and compensation therefor, so acquired by it as aforesaid, are subject, nevertheless, to the water rights, easements in, and servitudes upon said reservoir and system, and to all other rights acquired by these defendants therein as aforesaid and annexed to the respective parcels of lands of these defendants.

Defendants each, except the defendants C. H. Rippey and M. L. Ward, admit that they are each the owners of tracts of land under the said water system of said land & town company, and that most of these defendants own and hold small tracts of only a few acres each, and they say that none of them owns to exceed twenty-five acres irrigated from said system, except Warren C. Kimball, who owns about seventy acres, and that each of said defendants owns his and her tract in severalty, except as follows: The defendants Edward Gulick, William Gulick, and Henry Gulick own twenty acres of land as tenants in common. The defendants 24 J. M. Howe and H. O. Howe own twenty acres of land as tenants in common. The defendants Arthur Ryan and Michael Mack own ten acres as tenants in common; and the defendants F. E. Leslie and H. P. Whitner own ten acres as tenants in common.

These defendants admit, and each for himself and herself admits, that each defendant owning land as aforesaid has become the owner of a water right to a part of the water appropriated and stored by said company necessary to irrigate his and her said land.

And they say, and each says, that said water rights owned by the defendants respectively extend not only to the irrigation of the said respective tracts of land, but also to supplying the needs of persons resident and of animals kept thereon respectively.

And they say that each of their said water rights embraces the right and easements of the service of the reservoir and distributing system of said corporation for the delivery of the water at and upon their respective lands for all of said uses by the automatic gravity pressure existing under said system, and that each such water right and easement is in freehold and is a freehold servitude imposed upon said water system for the benefit of the land to which it is appurtenant, and that all claims and demands of said company for the price or compensation therefor has been paid or otherwise satisfied by purchase or otherwise as in the bill of complaint alleged.

And these defendants further say that said water rights extend to and include the right to have said corporation maintain said system efficiently to conduct the water to and deliver the same on the premises of each of the defendants for irrigation and other uses at and for the annual rates to be deemed and accepted as the legally established rates therefor under the facts hereinafter set forth.

And defendants admit that at the times mentioned in the  
25 bill of complaint the said company was furnishing them and each of them with water through its said system.

And these defendants say that of the said 12,000 acres of farming and orchard lands lying under said reservoir and within the reach of water supply therefrom the said corporation, in January, 1887, owned and for a long time prior, to wit, since the year 1869, had owned and held, for the purpose of sale, use, and profit, about seven thousand acres.

And, further answering, these defendants say that the lands of said corporation owned by it in January, 1887, as hereinbefore stated, irrigable from its said reservoir and distributing system, as so constructed, are situate in the Sweetwater valley, in Chula Vista and in National City, all within the boundaries of National ranch, in said city of San Diego; also in Otay valley, in said county, adjoining said National ranch on the south, and in the territory known as ex-Mission lands, adjoined to National City on the north, and that said lands, together with the said town lots owned by said company as aforesaid, *from* virtually one continuous tract, extending from near the base of the said Sweetwater reservoir westward to the bay of San Diego and from the Otay valley on the south to the municipal boundaries of the city of San Diego on the north and west thereof.

That the lands as owned in January, 1887, by others than the said company are in detached parcels scattered among said lands of the said company.

And they say that said lands of said corporation were, in January, 1887, entirely unsettled and in their wild and natural state, and were almost entirely arid and of but little value without water for irrigation.

That the said lands belonging to others than said company were also at said date largely unsettled and in their wild and natural state and were of the same general character with those of said company.

26 And these defendants say that the San Diego Land & Town Company acquired its said water, water rights, reservoir site, reservoir, and distributing system for the purpose of devoting the same, first, to irrigate its own lands aforesaid and to supply the needs of inhabitants of said land who should be induced to purchase said lands from it as lands under irrigation and to be settled on said lands.

And that the object of said company in acquiring and constructing said water system was to enable it to sell its said lands as irrigated lands, with the easement of the perpetual flow and use of the water necessary and useful to irrigate the same, and to supply all the beneficial uses of the people who should settled upon them, annexed as appurtenants in freehold thereto, and to create the freehold servitudes upon its said water system corresponding to such easements.

And defendants aver that said water, water rights, and said water system, to the extent necessary and useful for the irrigation of the

lands of said company, became a part of said land and became merged in the estate of said company in said realty as one estate.

And they say that, subject to the foregoing purposes, the said San Diego Land & Town Company devoted and appropriated the remainder of its said water, water rights, and the capacity and service of its reservoir and whole water system to the sale, rental, and distribution of the use of water to the public.

And these defendants say that said land & town company, in part execution of its said first and primary purpose, object, and project for selling its own lands, laid out and platted its tract of lands known as Chula Vista, which consisted of about five thousand acres, in blocks of forty acres each, and bounded each such block by avenues and streets, and subdivided said blocks into lots of five acres each and laid pipes through seven avenues therein, each  
 27 about three miles in length and separated from each other one-fourth of a mile, and also piped said Chula Vista at right angles with said avenues at the distance of every mile in the street crossing said avenues, and by said means said company's distributing system was made sufficient to reach and serve with water each five-acre lot on said Chula Vista tract, and also reach its farming lands lying within the said city of National City, and extended pipes from its said system through said National City to serve and irrigate 390 acres of said ex-Mission lands outside and to the northward of the same, and that, in still further execution of said project, the said company laid pipes in the Sweetwater valley and elsewhere in National ranch, in the Otay valley, and in the tract known as ex-Mission, to reach and within reach of its said lands there situated.

And, further answering, these defendants say that nine-tenths of the said company's distributing pipe system aforesaid, when laid and ready for operation in February, 1888, was so laid in anticipation of future use and demand for water supply and not for any use or demand then existing, and that when laid it was, and to a great extent still is, ahead of the demands therefor, and that much thereof has laid unused.

And, further answering, the defendants say that from the time when said corporation entered upon the enterprise of constructing said water system it has at all times advertised in print and in writing subscribed by it and held its said farming and orchard lands for sale, and up to January 1st, 1896, did, as an inducement to the purchase thereof, both privately and publicly and continuously, in writing subscribed by it and otherwise, represent that the water of its said system was piped to and over said lands and lots, and was and would be supplied to purchasers thereof in abundance for irrigating the same at the rate of \$3.50 per acre per annum for farming and orchard lands.

And, further answering, these defendants say that the said  
 28 corporation, since the early portion of the year 1887 and up to January 1st, 1896, had at all times kept its said land continuously on the market for sale, with and under said representa-

tions as to water supply thereof and as to the annual rate for the same for irrigation.

And, further answering, these defendants say that the lands of said corporation situated in the Sweetwater valley, in the Otay valley, and in the ex-Mission, consisting of about 5,700 acres, without the appurtenant water supply under said system, have at no time been worth more, in case purchasers could be found, than an average of \$35.00 per acre, and that its land in Chula Vista, comprising about 5,000 acres, as aforesaid, as so laid out and platted, without the appurtenant water supply under said system, have at no time been worth more, in case purchasers could be found, but rather less, than an average of 75.00 per acre, and that its lands, other than town lots, situate within said city of National City, comprising about 900 acres, without the appurtenant water supply under said system, have at no time, in case purchasers could be found, been worth more, but rather less, than an average of \$100.00 per acre.

That by reason of said appurtenant water supply the said corporation regarded and treated the value of said lands and lots as proportionately enhanced, and that accordingly it has at all times since early in the year 1887 held its raw lands, including the annexed perpetual easement water supply from its said water system, in said Sweetwater valley, in said Otay valley, and in said ex-Mission, at an average of \$250.00 per acre, and has at all times held its raw lands in Chula Vista, with the said annexed water supply, at prices ranging from \$300.00 to \$500.00 per acre, except that it offered and sold about six five-acre tracts of its Chula Vista lands at \$150.00 per acre, as an inducement to the first few purchasers to locate thereon,

and has at all times held its lands within said city of National City, together with the water supply annexed, at \$350.00 to \$500.00 per acre, and has held its lands, where improved by it with the aid of said appurtenant water supply, outside of the value of improvements on the same basis of valuation for the land and water.

And these defendants, further answering, say that, at said prices and under said representations that the annual rate for water for irrigation was and would be \$3.50 per acre, said corporation had, up to the date of the filing of the bill of complaint herein, sold to certain of the defendants and their predecessors in title, severally, parcels of said irrigated lands outside of National City aggregating about twelve hundred acres, with the freehold easement of water supply annexed as an incident and appurtenant to the land granted, and that in cases of the purchase of each such parcel of land each purchaser thereof respectively relied upon said representations of said corporation that the annual rate for water to be supplied for irrigation was and would remain not higher than \$3.50 per acre, and that in each case of such parcel of land so sold said corporation, prior to making its conveyance of the same to said purchasers, connected said lands with the actual flow of water from said system, both for irrigation and domestic and other uses, for persons and animals thereon, and in respect of lands in said Chula Vista so sold by said corporation that it exacted from and imposed upon

each of said purchasers of a tract from it his obligation to erect a residence house thereon at once, to cost not less than \$2,000.00.

And these defendants, further answering, say that up to December, 1892, said corporation made no express or separate grant of "water rights" as appurtenant to such of said land up to that time so sold by it to certain of these defendants, but granted the easement of the flow and use of water from its said system as an appurtenant of the land sold and granted with such land after

30 it had been connected with the said water system and after the said flow and supply of water had been applied to irrigate the land so sold and to the use of persons living and animals kept thereon, and contracted for and received compensation for the land and appurtenant water right in a single price for both.

That after December, 1892, said corporation in all cases where it sold of its said lands did, by an express contract in writing, specifically sell to those of the defendants who purchased lands from it after that date the appurtenant water right, and that each of such contracts contained the following provisions (the description of the land and the price for the same with water being adapted to each case), to wit:

"That in consideration of the stipulation herein contained, and the payment to be made, as hereinafter specified, the party of the first part," (said corporation) "hereby agrees to sell unto the party of the second part, and the party of the second part agrees to purchase of the party of the first part, the following real estate, to wit: " (Description.) "Together with a water right to the one-acre foot of water per annum for each and every acre of said above-described real estate, to be delivered by the party of the first part through its pipes and flumes at a point — said water to be used exclusively on said real estate, and to become and be appurtenant thereto, and not to be diverted therefrom. Provided, that the party of the first part may change the place of delivery of said water, so long as the same is near the highest point of said land. For which land and water right the party of the second part agrees to pay the sum of — dollars.

"And the party of the second part further agrees and binds —self — heirs, executors and assigns, to pay the regular annual water rates allowed by law and charged by the party of the first part for the water covered by said water rights, whether said  
31 water is used or not, and to pay for all water used on said land for domestic purposes, monthly, under such rules and regulations for the delivery of water to consumers as the party of the first part may from time to time make."

And these defendants say that in the character and quality of the appurtenant water rights connected with the land sold by said corporation, as aforesaid, no discrimination exists or has at any time been claimed by said corporation or has at any time been recognized by said purchasers between the lands so sold by it after the inauguration of said water system up to December, 1892, and those sold by it after that date with the express and specific provisions as hereinbefore set forth.

And these defendants, further answering, say that the title to the lands of certain of them, to the aggregate of about nine hundred acres, lying outside of said National City, was not derived from said corporation, and in respect to such lands they say that said corporation furnished water for the irrigation of so much of such land as came into cultivation up to December, 1892, without exacting a price for a water right, but voluntarily annexed the perpetual easement of the flow and use of water from said system to said lands, and voluntarily in all respects has from the beginning of its water service treated and still does treat the same as to water rights in all respects on the same footing as the lands sold by it to other of these defendants or their predecessors in interest, as hereinbefore alleged, and that from the beginning of its water service, in 1887, until now the annual water rates actually established and collected by said corporation for water furnished by it to land not sold by it have been the same as for water supplied to lands sold by it.

And defendants, further answering, say that from and after said date of December, 1892, said corporation refused to furnish water to irrigate other or further lands under said system not owned or sold by it except upon the payment of a sum in gross for the water  
 32 right over and above the uniform annual rate as actually established and collected from all lands under the system, or in lieu thereof of six per cent. annual interest upon its estimate of the value of such right.

That it first fixed the price of such water rights at \$50.00 per acre and later raised the same to \$100.00 per acre, and that after the same date of December, 1892, it furnished no water to irrigate any lands not sold by it except upon payment of the price fixed by it for a water right under a contract for the sale of such water right containing the following provisions (the filling of the blanks being adapted to each case), to wit:

"That the party of the first part (said corporation) agrees to and does hereby sell to the party of the second part a water right to one acre foot of water per acre per annum, for each and every acre of the real estate hereinafter described, to be delivered through the pipes and flumes of the party of the first part — for the sum of — dollars, payable as follows: —. Provided the party of the first part may at its option change the place of delivery of said water, so long as the same is near the highest point on the lands for which the water is delivered under and in accordance with the rules and regulations established from time to time by the party of the first part. Said water right is sold for the use of and to be appurtenant to the following-described real estate now owned by the party of the second part, in the county of San Diego, State of California, to wit: —, consisting of — acres.

"And it is expressly understood and agreed that the water right hereby sold shall belong to said described real estate and be used thereon, and not diverted therefrom or used on any other lands.

"In consideration of the foregoing stipulations and agreements, the party of the second part agrees and binds —self — heirs, exec-

33 utors and assigns, to pay the sums above specified promptly as the sums, and each of them, falls due, and that — will in all things comply with and perform the terms and conditions of this agreement on — part to be performed, and that — and they will promptly pay all annual water rates and charges for *th* the water to which — is entitled under and by virtue of this agreement, at rates fixed by the party of the first part as allowed by law, and at the times, in the manner, and according to the rules and regulations made and adopted by the party of the first part, the annual rental for the amount of water to which the party of the second part is entitled under this contract, to be paid whether the same is used or not, and also to pay for all water used by — on said land for domestic purposes at the rates fixed by the party of the first part and allowed by law."

And that said company annexed, under said form of contract, the water rights referred to in the bill herein, which are appurtenant to about 400 acres of the lands of certain of these defendants.

And that said corporation at no time has made or claimed, and does not now make or claim, any distinction in respect of the character and quality of the water right or of the annual rates actually established or collected for irrigation between such of the said lands not purchased from it as are furnished with water for irrigation by it, whether under such special contract for water right or without.

And these defendants say that the defendant J. M. Ballou owns his water right, alleged in the complaint, by virtue of a special written contract with said corporation making such water right appurtenant to his land for a valuable consideration by him paid to said corporation and under the provisions as to rates in the words, to wit:

34 "Provided, that said party of the second part shall make application in the form provided by the company, for the use of the water, and use the same under the same restrictions and conditions, and to pay said party of the first part the current rate therefor, as established, for Chula Vista; provided, said restrictions and conditions are not inconsistent with the water right hereby granted to said party of the second part."

And these defendants further say that of their number the owners of the lands to the amount of about 400 acres, which lie in said ex-Mission, and which have annexed to them water rights, as in the complaint alleged, entered into a written contract with said corporation for the use and flow of said water to said lands, and that said contract contains the following provisions:

"The parties of the first part will make application for the use of the water upon the form provided by the party of the second part for that purpose, and pay for the use of the water at the current rates as may be enforced from time to time for supplying lands in National ranch, and subject to the same general rules and regulations."

And, further answering, these defendants say that on or about June 3rd, 1895, said corporation established a classification of lands which had been or which should be provided with water by its system, to take effect July 1st, 1895, and afterwards confirmed the



same to take effect January 1st, 1896, and that said classification has been adopted by the complainant receiver and is in words following, to wit:

"Tenth. For the purpose of fixing rates for irrigating acre property the lands of that character are classified as follows:

"All lands to which the easement and flow of water for irrigation has been or shall be annexed by the consent or voluntary act of this company shall constitute the first class.

"All lands to which the easement and flow of water for irrigation has not been or shall not be annexed by the consent or voluntary act of this company shall constitute the second class."

35 And in respect of said second class of lands it at the same time promulgated the following, to wit:

"In addition to said annual rate for water used upon lands of said second class, there shall be paid upon the lands of said class an annual charge equal to six (6) per centum of the value of the right to said easement and flow of water for irrigation, which said value is to be taken as one hundred dollars (\$100.00) per acre."

And these defendants say that the lands of each and all of the defendants fall within the first class so defined by said corporation and said receiver.

And these defendants further say that said corporation has planted and improved other considerable tracts of its said lands still owned by it, aggregating about 1,500 acres, outside of said National City and about 75 acres within said city, and has used and is using thereon water supplied from its said system as appurtenant to said land and for cultivating the same, and also holds said lands, with such appurtenant easement of water supply, for sale, and that said corporation retains the remainder of its said lands under said system, comprising about 4,000 acres, to which water has not actually been applied, at valuations not less than hereinbefore stated for raw land, with the incident and easement of water supply annexed, and has refused and at all times refuses to dispose of the same without including said water supply, except on the conditions that purchasers would pay to complainant the price for said lands so fixed by it, and to include the price of a water right or interest at six per cent. per annum on the price of such water right, at the option of the purchaser.

36 And they further say that in estimating the annual income from water rents under its system said corporation has, from the beginning of its said water supply, treated its said lands so actually irrigated by it as being precisely on the same footing as to annual rates with the lands of each of these defendants, and has entered up upon its books the same rate per acre per annum as chargeable to said lands as that charged to the lands of defendants, and that said receiver has done and does in all things do likewise.

And they say that in the classification aforesaid made by said corporation and its receiver no discrimination is made or at any time has been made between lands of the first and second class in respect of the annual rate, and that the said additional charge of six per cent. per annum upon the value of such water right applies



only to such lands as shall receive the use and flow of water from said system for irrigation upon demand of their owners to share in that part of the said waters appropriated by said corporation to the public use in the cases where the owners shall not have paid or secured to be paid, by contract or convention with said corporation, the gross sum demanded by it for the sale and conveyance of the water right for such lands, and they say that none of the lands of these defendants now under irrigation fall within the second class.

And these defendants say that they have each accepted and concurred in and do accept and concur in the said classification of lands as made by said corporation and receiver, and that the same has become established, and that the same is just, equitable, and reasonable as between said corporation and all the land-owners under said system.

And these defendants say that the aggregate number of acres of land now under irrigation from said system, including those of these defendants, of said corporation, and of all others, does not exceed 4,300 acres, or one-half of the capacity of the reservoir and distributing capacity of the main pipe lines of said corporation after allowing for the domestic uses of 20,000 persons, and that about 800 acres of said land so irrigated lie in National City.

And these defendants further say that neither of them know, and that neither of them has been informed, save by complainant's said bill and the statement of said corporation, what is the actual annual expense of operating and keeping in repair the said reservoir and water system of said company and furnishing its consumers with water, exclusive of the alleged interest of seven per centum of \$300,000.00 of the bonds of said corporation referred to in said bill, but that, upon such information, they are informed and believe, and therefore allege, that the said annual expenses do not exceed the sum of \$12,034.99, as stated in the bill of complaint herein.

And they aver that the "natural and necessary depreciation of its system" referred to in the bill of complaint is made good by the keeping of the same in repair, the cost of which is included in the annual charges, and they say that, as shown by the books of said corporation and its official reports, the aggregate, under the head of its accounting for "water service," "maintenance of pipe lines," "maintenance of Sweetwater dam," and "expenses" for the years ending December 31st, 1890, 1891, 1892, 1893, and 1894, were respectively \$8,015.48, \$13,002.46, \$11,395.17, \$11,410.48, and \$7,850.18.

And, answering upon such information, they allege that the amounts so actually realized from the whole system for water rentals alone, exclusive of any proceeds of the sale of water rights during said year, did not fall below \$25,715.00, and they say that at the same rates the amount that will be realized by said corporation from the annual rentals under said system, exclusive of any sums derived from the sale of water rights, will not, for the year ending January 1st, 1897, fall below \$27,000.00; and the defendants say and each

38 of them says that the amount of \$25,715.00 was collected as water rentals for the year ending January 1, 1896, for the several purposes for which water was used from the said company's system, with the irrigation rate fixed at three and one-half dollars per acre per annum, and that the sum of twenty-seven thousand dollars is the measure of the yield for the year ending January 1st, 1897, from the said rentals, with the rate for irrigation fixed at the same annual rate of \$3.50 per acre and with but two-thirds of the capacity of said system in use.

And they further say that the said amounts actually realized annually from water rents under said system are derived from sums paid in respect of the lands owned by others than the said corporation and the rentals attributed to the lands owned by said corporation actually under irrigation, and that no part thereof has at any time been derived from or attributed to the lands of said corporation, whether still owned by it or heretofore sold by it, so long as the same were not or still are not actually irrigated.

And defendants further say that they are informed by the records and official reports of said corporation, and therefore aver the fact to be, that on January 31st, 1894, the net balance of its actual receipts from water rentals, based on collections actually made from lands actually irrigated, both those sold and those never owned by the company, and sums charged to lands owned by the company actually irrigated from February, 1888, to said December 31st, 1894, accumulated in its hands to the credit of said water system, after deducting the items of "expenses," "maintenance of pipe line," and "maintenance of Sweetwater dam," was \$49,699 28.

But they say that said net balance to the credit of said water company's department on said December 31st, 1894, does not include any charge, rate, or assessment to the lands of said corporation which at any time were not or that now remain unirrigated.

39 And these defendants deny that the annual expenses of said corporation to operate and maintain its water system exceed the sum of \$12,034.99, as in the bill of complaint alleged.

But these defendants, further answering, say that they deny that said corporation is entitled to demand or receive from these defendants any sums whatever, by way of water rentals, in behalf of or to apply upon the said demanded income of six per cent. or any net income on the alleged cost of said water system.

And they deny that they or either of them own their said water rights in and under said water system subject to any obligation, legal or equitable, other than such as arises from the actual rates established, as aforesaid, and collected by said company, which, in case of their lands, is \$3.50 per acre per annum.

And they deny that the compensation to said corporation for either of their respective water rights, easements, or servitudes aforesaid were or are still subject to regulation by any board of supervisors of this State, as provided in said act of 1885.

They aver that such of their number as have purchased their said lands, with water rights appurtenant thereto, from said corporation and such of their number as have purchased of said corpora-

tion water rights made appurtenant to their lands, not bought of the corporation, have each and all paid the full amount demanded by said corporation as the price of the perpetual easement of water supply from said company's water system by said company granted and annexed to such lands. They aver that such easements are respectively servitudes upon said company's water system and have been fully paid for, and that the owners of said lands are forever discharged and acquitted from payment of any further sum or sums to apply on the principal of or as income upon the cost or value of said water system or any debt incurred by said corporation for construction thereof or the value of their respective water rights.

40 And they allege that said company, in each of said cases where water was devoted to the public use, received satisfaction for from and parted with to each of said defendants or to his or her predecessor in interest all right to demand and collect water rentals proportioned to said lands as corresponded or related to interest or income on the cost or value of said system or to net annual receipts and profits thereon or therefrom.

And that in said respects it has at all times put all other lands to which it has voluntarily annexed said water rights upon the same footing, and that all such lands have remained on the same footing for more than five years; that said lands have in many cases changed owners while so supplied with water at the same rates and on the same footing as to water rights with the land sold by the said company with annexed water rights, as aforesaid; that the value of said water rights has for more than five years entered into the market value of said lands and has in all cases been paid for to their vendors by the present owners, these defendants, who are successors in title by mesne or immediate conveyances of the lands to which, during the former ownership, the company voluntarily annexed said perpetual easement and water rights, and that neither any such lands nor the owners of any thereof are in any event liable for any other or further water rentals than are the lands the ownership of which, with said water rights, *were* derived from said corporation.

And these defendants, further answering, say that true it is, as alleged in the bill of complaint, that said land and town company commenced to furnish water to consumers in the year 1887; but they say that its regular water service commenced in the month of February, 1888.

They further say that true it is, as alleged in the bill of complaint, that said corporation did, as early as February, 1888, 41 and as aforesaid, fix and establish and has since charged the rate of \$3.50 per acre as the annual rate for irrigation and no more until January 1st, 1896.

And these defendants each say that said annual rate of \$3.50 per acre is the only actual rate which has ever been established or that has ever been collected by said corporation or which has at any time been paid or assented to by the consumers under said system

from the said beginning of its water service down to the time of filing the bill of complaint herein.

That said rate so actually established and collected has during more than nine years last past been uniform as to all the lands actually irrigated under said system, and defendants say that it has been uniform and without discrimination in respect of all the lands of these defendants at all times.

And these defendants further say that they were induced to purchase, improve, and settle upon their said respective parcels of land in reliance upon the fact that said rates of \$3.50 per acre per annum for irrigation under said system has during all said period of time been uniformly and actually established and collected by said corporation; and they aver that said irrigation rate has entered into the value of all the land of these defendants and is a material element of such value.

They admit that no other person or corporation is or ever has been furnishing a supply of water to said defendants and other consumers, and that there is not now nor has been any other system of water works by which said defendants can be furnished with water.

And these defendants deny that the capacity of said water system is only sufficient to supply water to not exceed seven thousand acres, together with the water demanded for domestic use, and aver that it is of sufficient capacity to supply nine thousand acres, together with domestic uses of a population of twenty thousand persons.

42 And they deny that at the rate of \$3.50 per acre, if water should be demanded and used upon the whole of the lands which the system is able to supply with water, and rates are allowed in said National City equally high for domestic uses and irrigation, said company would not be able to pay its operating expenses and maintain from such rentals its plant and system. They deny that said company has been or still is under said established rates losing money every or any year. They deny that its said plant and system has been or is gradually going to decay from natural depreciation consequent upon its use in supplying consumers with water without any or sufficient resources or means provided from said rates for replacing the same. They deny that said company, if said rate of \$3.50 per acre is maintained, will be compelled to furnish water to consumers at any actual or continuous loss; and they deny that if the rentals derived from said system at the rates actually established and collected, including said rate of \$3.50 per acre, are fairly applied to manage, operate, and maintain the same that said system will be lost.

And these defendants deny and each of them denies that in order to pay the said company the amount of its annual expenses and an annual income of six per cent. upon the present cost and present value of its said water system it is necessary that the rates for water sold and consumed be so fixed as to realize to said company, when its system is wholly employed, the sum of \$119,791.66 or any less sum in excess of \$32,000.00 per annum.

And defendants aver that neither the present cost nor the present cash value of the whole of said property constituting said water system exceeds the sum of \$300,000.00, and that not over one-half of the capacity of said system was on January 1st, 1896, in use, and that not over two-thirds of the capacity of said system is now in use.

And defendants deny that in order to pay the cost of operating the plant of said company and maintaining the same and  
43 pay said company as much as six per cent. net annual revenue upon the present cost and cash value of its said plant and water system it is or will be necessary to charge a rate per acre per annum of not less than \$7.00 for irrigation purposes or any sum in excess of \$3.50 per acre per annum for irrigation purposes in connection with the rate for water for domestic use under said system actually established and collected.

They deny that \$7.00 per acre per annum or any sum in excess of \$3.50 per acre per annum is a reasonable rate for these defendants as consumers to pay. They aver that each of them is owner of a right and easement in freehold of the flow and use of water through the water system of said company as in the bill of complaint alleged, and that the same is appurtenant to their respective lands, and that their lands fall within the first class established by said corporation, and that from them said company is not entitled to any interest on its investment in said plant, and they aver that the sum of \$3.50 per acre per annum for the use and enjoyment of said easement and maintaining and operating of said system has been actually established, as aforesaid, and is the only rate which has been collected by said corporation for the nine years last past from these defendants and their privies in the title to their said lands, and that no other rate has ever been actually established in respect of their lands or at any time collected, and that said rate is the ample and sufficient contribution of said lands for the maintenance of said works.

And these defendants aver that they and each of them respectively and their predecessors in estate, owners of the said several tracts of land now held and owned by the said defendants, have for more than five years prior to the first day of January, 1896, continuously held and enjoyed the use of the said waters upon their

44 said lands for irrigation purposes, paying therefor the annual sum of \$3.50 per acre, and that such use and enjoyment has been open, notorious, continuous, adverse, and uninterrupted, and that they have thereby acquired the right to have and enjoy said water for the purpose of irrigating their said lands, paying therefor the said annual sum per acre, and that said right has become vested in them by such use under the said deeds of conveyance and representations and assurances, as aforesaid, and by the operation of section 318 of the Code of Civil Procedure of the State of California, and that they are entitled to have and use the said water from the said works, paying therefor the said sum per acre per annum and no more.

And these defendants aver that the said corporation is barred from having or maintaining any action at law or in equity to change

the character of or add to the burden of said easement or to increase the said annual payment for the use of the said water, and is estopped to assert, claim, or exercise any right to change the said annual payment.

And the said defendants admit that by the laws of the State of California the board of supervisors may, upon the petition of twenty-five inhabitants and tax-payers of the county, fix the rates of the yearly rental to be collected by any company furnishing water to consumers when the same is furnished as a public use, and that no such petition has ever been presented or rates fixed in the case of said land & town company.

That admit that said land & town company gave notice to the defendants that on January 1st, 1896, it would undertake to establish a rental of \$7.00 per acre per annum for water supplied to their and each of their lands for irrigation, and that from and after said date it would undertake to require them and each of them to pay said sum for the irrigation of their and each of their lands, and they admit that complainant, after his alleged appointment as receiver and before said date, gave a similar notice.

And these defendants each say that at the date of said notices they were and for a long time prior thereto had been in the  
45 continued enjoyment of their said water rights and easements and the flow of the water thereunder, and were paying and always had paid to said company \$3.50 per annum for each acre irrigated by them and each of them.

And they say that said notice contained the further demand, as a condition to the refraining by said company from interfering with and shutting off the water supply of each of these defendants under their respective easements and water rights aforesaid, that the defendants each subscribe and execute an instrument upon a certain printed form designated "Application for water," which contained the following words and figures:

"NATIONAL CITY, CAL., — —, 1896.

"To the San Diego Land & Town Company:

"The undersigned hereby applies for a permit to connect service pipes with the mains of the company and for water service under the rules and regulations of the San Diego Land & Town Company, which are expressly made the basis for the application, and which he agrees to observe for the following purposes and at the following rates for the year ending June 30th, 1896:

"No.	Monthly rate.	Annual rate.	Total.	Date.
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"Family of four persons.

"Additional persons.

"Bath.

"Water-closet.

"Horses.

"Horses.

"Carriages.

"Cows.

" "

" Lot and block property.

" Lots.

" "

" "

" Irrigated land.

46 " Acres.

" "

" Acres.

" Interest charges.

" Total annual rate for the year ending June 30, —, which I agree to pay, quarterly in advance, at the office of the San Diego Land & Town Company.

" The water to be furnished under this application to be used on the following land or property :

" Lot.      In block.       $\frac{1}{2}$  sec.

" National City.

" National ranch.

" Ex-Mission.

" More fully described as follows :

" The location of the *top* is on — side of — avenue,  
street,

between — and — avenues.

" This contract shall remain in force until the first day of next July, when it may be terminated at the request of either party, notice to be served in writing ; but in case no such request is made, then the same shall continue in force for one year, thereafter, and so on from year to year until such request is made ; which request, when made, shall be to terminate this contract on the following July first.

" Provided, that if the water is furnished under this application after June 30th, 1896, the same shall be paid for at the rate fixed by the proper authorities, or the rules of the company, for the year the same is furnished, and subject to the rules and regulations of the company, the same to be payable quarterly, unless otherwise provided by said rules and regulations.

" Applicant : — —.

" SAN DIEGO LAND & TOWN CO.,

" By — —."

47 And these defendants admit that each of them has refused to pay said rate of \$7.00 per acre, and that they do maintain that neither the said land & town company nor the complainant has any legal or equitable right to increase the amount to be paid by any of them, and that the rate of \$3.50 per acre per annum actually established by the said land & town company by said contracts and conveyances, use, and practice, and which rate has at all times since the inauguration of said water system been collected and paid for the use of said water, must be and remain, and of right ought to be and remain, the established rate to be paid by these



defendants for such use as against the said attempt of said company and the complainant to raise the same to \$7.00 per acre per annum.

And defendants, further answering, allege that by the constitution of the State of California, adopted in 1879, it is provided in article XIV, section 1, among other things, as follows, to wit:

"The use of all water now appropriated, or that may hereafter be appropriated, for sale, rental or distribution, is hereby declared to be a public use, and subject to the regulation and control of the State, in the manner to be prescribed by law."

"SECTION 2. The right to collect rates or compensation for the use of water supplied to any county, city and county, or town, or the inhabitants thereof, is a franchise, and cannot be exercised except by authority of and in the manner prescribed by law."

And these defendants further aver that the legislature of the State of California, acting under and in pursuance of the said constitutional provisions, did, at its session held in 1885, pass an act entitled "An act to regulate and control the sale, rental, and distribution of appropriated water in this State other than in the city, city and county, or town therein, and to secure the rights of way

18 for the conveyance of such water to the places of use," which said act was duly approved by the governor of the State of California on the 12th day of March, 1885, and by the said act it was provided that all water now appropriated or that might thereafter be appropriated for irrigation, sale, rental, or distribution is a public use, and the right to collect rates or compensation for uses of such water is a franchise, and, except when so furnished by any city, city and county, or town or the inhabitants thereof, should be regulated and controlled, in the counties of this State, by the several boards of supervisors thereof in the manner prescribed in the said act, and it was, among other things, provided in the fifth section of said act that in the regulation and control of such water rates for each of such persons, companies, associations, and corporations the said board of supervisors might establish different rates at which water might and should be sold, rented, or distributed, as the case might be, and that said rates, when so fixed by such board, should be binding and conclusive for not less than one year next after their establishment and until established anew or abrogated by such board of supervisors, as thereafter provided; and it was further provided in the same section that until such rates should be so established or after they should have been abrogated by such board of supervisors, as in the said act provided, the actual rates established and collected by each of the persons, companies, associations, and corporations then furnishing or that should thereafter appropriate waters for sale, rental, or distribution to the inhabitants of any of the counties of this State should be deemed and accepted as the legally established rates thereof.

And they aver that said rate of \$3.50 per acre per annum established by said corporation, as set forth in the bill of complaint herein, is the only actual rate for irrigation which has ever been established and collected by said corporation or said receiver, and



49 they aver that the same is the only rate which ever has been legally established or which is to be deemed or accepted as having been legally established by said corporation therefor.

And these defendants deny that any increase of the rate for such rentals is at all necessary to enable said corporation or its receiver to maintain and operate said plant and pay the proper expenses of such maintenance and operation thereof.

They admit that in order to enforce the payment of said proposed rental of \$7.00 per acre per annum said complainant caused the water to be shut off from the premises of each of the said defendants until such demanded rentals should be paid, and they each deny that they or any of them threatened to commence suits in the superior court of the county of San Diego to compel complainant to turn on and furnish the water to their said lands or for damages.

They admit that their rights are the same to the extent that all are freehold easements, as aforesaid, and that the determination of the question of the right of said land & town company and of complainant to increase the rate of rental to be charged and collected will affect all of these defendants in the same way and to the same extent, except that the quantity of land owned by the several defendants is different.

And these defendants deny that all the questions involved in adjusting the rights of the parties in interest as involved in the controversies in this action can be better settled in one action.

They admit that the proposed increase in rates, if collected from all the lands irrigated under said system, including all those of defendants and all others, including those of the corporation itself, would add to the rentals collected by said company from all the said lands now under irrigation not less than \$14,000.00 per annum.

50 But the defendants each say, relating to the jurisdiction of this court of the said action against each defendant severally, that on and for a long time prior to January 1st, 1896, there was in force a rule adopted by the San Diego Land & Town Company, which was also adopted by said complainant as its receiver, as follows:

"1. All rates are payable at the company's office, and in all cases, except where the supply is taken through a meter or counter, will be collected in advance and within — (15) days of becoming due, as follows: For miscellaneous and domestic purposes, January, July, and October 1st, in quarterly payments.

"6. In case of non-payment of the water rate within fifteen (15) days after becoming due the supply will be discontinued and will not be again renewed until full and satisfactory settlement of all arrearages shall be made, together with the sum of one dollar for turning on and off."

That under said rule, on January 4th, 1896, being the time of the filing of the bill of complaint herein, the demand of complainant for increase of rentals "to enforce payment" of which complainant caused the water to be shut off from the premises of each of these defendants until such demanded increase of rentals should be paid, as set forth and stated in the bill of complaint, was for the quarter

year beginning with January 1st, 1896, and no longer; that no rental or compensation of any kind had accrued or become due or payable to complainant at the filing of the bill herein except for the first quarter of said year.

That such demanded increase of rental for any quarter of the year beginning January 1st, 1896, would, in case of no defendant or defendants associated as partners, be as much as \$2,000.00, but in each case very much less than that sum, and in case of the defendant having the largest number of acres of land irrigated under said system would not equal \$58.00, and in case of no other as much as \$35.00, and of most others not to exceed \$3.75 each.

And these defendants, further answering, say that they  
51 have no information, except as derived from the complainant's bill, from the solemn admission of said corporation, and from the records of the recorder's office of the county of San Diego, State of California, as to whether said corporation did borrow \$300,000.00 and as to whether it is compelled to pay thereon \$21,000.00 interest annually, or what portion of the said principal sum it applied to the acquisition and construction of its water system, and they deny that it is material for them to further answer any allegation with respect thereto.

And these defendants, further answering, say that they each have at all times since January 1, 1896, paid the rate or rental of \$3.50 per acre per annum to the complainant, as such receiver, and are willing and offer to pay the same as long as it continues to be legally established.

And, further answering, these defendants say that the statute of the State of California of 1885 referred to in the bill of complaint and in this answer of these defendants, in so far as it purports to prohibit the said company from selling, disposing of, or alienating servitudes in freehold upon its said water system or its said property used or useful to the appropriation or furnishing of water, or to prohibit said company from contracting respecting the same, or from receiving full payment, satisfaction, or compensation therefor from any consumer willing to contract, purchase, and pay for the same, and in so far as said statute prescribes that such servitudes shall be enjoyed by the owner of the land to which the same are annexed as easements only upon the terms and conditions that such owners render net annual receipts and profits upon the value thereof in perpetuity, and in so far as said statute purports to prohibit said company and the consumers of water under it from the making of contracts by and between said company and water consumers respecting the annual receipts, profits, and income of any of  
said property, or to extinguish and satisfy and make acquit-

52 tance of any right of said company to such net annual receipts, profits, and income, and in so far as such statute prohibits any of the contracts in this answer set forth relating to the sale, transfer, or vesting of the flow and use of water in freehold annexed to the lands of the respective defendants herein, and in so far as it prohibits the sale, transfer, and vesting of the ownership of the water rights in the bill of complaint referred to in these defendants

respectively and from becoming annexed to their respective parcels of land, the same is unconstitutional and void as being in conflict with the XIV amendment of the Constitution of the United States, in that such statute would deprive said company and these defendants of their liberty without due process of law and would deny to them and each of them the equal protection of the laws, and as being in conflict with the declaration of rights contained in section one of the constitution of the State of California, and which said section is in words and figures following to wit:

*"Article 1, Declaration of Rights—Inalienable Rights.*

"SECTION 1. All men are by nature free and independent, and have certain inalienable rights, among which are those of enjoying and defending life, liberty and property, acquiring, possessing and protecting property, and pursuing and obtaining safety and happiness."

And as being in conflict with article twenty, section nine, of the constitution of the State of California, which is as follows:

"SECTION 9. No perpetuities shall be allowed, except for eleemosynary purposes."

And each defendant for himself says that his liability to pay rentals or charges of any kind for the service of said system is several and not joint, except only in the case of said defendants associated as partners, which is joint only as between such partners.

And the defendants say that the following defendants, among others, are not inhabitants or residents of the State of California and are not competent to make petition to the board of supervisors, as provided in section 3 of said act of 1885, to wit:

T. M. Eaton, Charles Mohnike, the heirs of Schulenburg, deceased; E. J. Elliott, H. E. Klammer, D. S. McBean, Edwin S. Belcher, J. W. Stearns, N. J. Pillsbury, Mary D. Klammer, Arthur Ryan and Michael Mack, L. V. Wright.

And they say that the following-named defendants are public-school corporations and not tax-payers of any county of this State:

Chula Vista School District, Sunnyside School District, Sweetwater School District, and for said reasons are not competent to make such petition.

And the following-named defendants, among others, are not inhabitants of said county of San Diego, to wit: Edward Gulick, William Gulick, and J. O. Rhinehart, and for said reasons are not competent to make such petition.

And said defendants, so being incompetent to petition the board of supervisors, as provided by section 3 of said act of 1885, say and all the defendants say that they have no power to compel any sufficient number of competent inhabitants who are tax-payers to join in a petition to the board of supervisors, as provided in said section 3 of said act.

And these defendants say that said statute of the State of California approved March 3rd, 1885, in so far as it assumes or purports

to authorize or empower said San Diego Land & Town Company or said receiver to increase, as is alleged in the bill of complaint, said rate of \$3.50 per acre per annum heretofore actually established and collected from the defendants without the consent of the defendants and each of them, is in violation of section one of article XIV of the amendments of the Constitution of the United States, and deprives each of them of his and her property without due process of law and denies to each of them the equal protection of the law.

54 And these defendants further say that, in so far as said statute of 1885 purports to authorize or empower said land & town company or its receiver to shut off or to justify them or either of them in their act, as set forth in the bill of complaint, in shutting off the water from the lands of these defendants or either of them, or to deprive these defendants or either of them of the enjoyment of their said water rights and of their said easement of the flow and use of such water for the irrigation of their said respective tracts of land as a means of enforcing against these defendants the collection of the increase of rental demanded in the bill of complaint or any increase made without consent of these defendants of the said rate of \$3.50 per acre per annum heretofore actually established and collected from these defendants, and in so far as said statute purports to permit or authorize such enforced collection without permitting these defendants to have any standing in this court to contest the reasonableness of said increase of rates, and in so far as it purports to empower this court or any court to enjoin these defendants or any of them from contesting the reasonableness of said increase of rates in any court, the same is unconstitutional and void as tending to deprive and depriving these defendants and each of them of their property without due process of law and as tending to deprive and depriving them and each of them of the equal protection of the laws, in violation of section one of the XIV amendment of the Constitution of the United States.

And these defendants humbly submit and insist that the rate of rental for irrigation of each of their said parcels of land ought not to be changed or altered from the rate of \$3.50 per acre per annum, being the rate and rent actually established and collected by said San Diego Land & Town Company and said receiver, as aforesaid.

And, further answering, these defendants admit that the complainant, C. D. Lanning, was appointed receiver of all the  
55 property of the said San Diego Land & Town Company of Kansas by the circuit court of the United States for the district of Massachusetts at the time and with the powers as in the bill of complaint alleged, and that said receiver took possession of said property and of the management thereof as such receiver.

And these defendants aver and each of them avers that the acts of said receiver, as set forth in the bill of complaint, in undertaking to raise the said rate of \$3.50 per acre per annum for irrigation to \$7.00, and in shutting off the water supply, as in the bill of complaint alleged, are and each of them is in violation of article V of the amendments to the Constitution of the United States, as acts

done under a color of authority of the United States, tending to deprive and depriving these defendants and each of them of their property without due process of law.

And these defendants, as matter of supplement to their said answer, state that the legislature of the State of California, at the session thereof held in 1897, passed an act entitled "An act to amend an act entitled 'An act to regulate and control the sale, rental, and distribution of appropriated water in this State other than in any city, city and county, or town therein, and to secure the rights of way for the conveyance of such water to the place of use,' approved March 12th, 1885, by inserting a new section therein relating to contracts for the sale, rental, and distribution of water, and the sale or rental of easements and servitudes of the right to the flow and use of water," and which said act was duly approved by the governor of the State of California on the 13th day of March, 1897, and thereupon immediately went into effect.

And defendants further aver that the addition so by the said amendment made to the said act was a section numbered 11½, and which said section is in the words following, to wit:

56 "SECTION 11½. Nothing in this act contained shall be construed as prohibiting or invalidating any contract already made, or which shall be hereafter made, by or with any of the persons, companies, associations or corporations described in section two of this act, relating to the sale, rental or distribution of water or to the sale or rental of easements and servitudes of the right to the flow and use of water; nor to prohibit or interfere with the vesting of rights under any such contract."

And these defendants further aver upon information and belief that by virtue of the said provisions of the Constitution of the United States and of the State of California and under and by virtue of the act of the legislature of March 13, 1897, before mentioned, these defendants and each of them had the right to enter into the contracts with the said San Diego Land & Town Company herein set forth, and the said contracts are valid and effectual, and that the said complainant had no right to make such increased charge for the use of water as aforesaid.

And these defendants deny that any other matter or thing in the said bill of complaint contained and not herein and hereby well and sufficiently answered unto, confessed and avoided, traversed or denied, is true, to the knowledge or belief of them or either of them.

All which matters and things these defendants are ready to aver, prove, and maintain as this honorable court shall direct, and pray to be hence dismissed with their costs and charged in this behalf most wrongfully sustained.

JOHN S. CHAPMAN,  
C. H. RIPPEY, AND  
HAINES & WARD,

*Solicitors for said Defendants.*

STATE OF CALIFORNIA, )  
 County of San Diego, ) ss :

57 D. L. Murdock, being first duly sworn, deposes and says :  
 That I am one of the defendants named in the foregoing-  
 entitled further answer ; that I have read said further answer  
 and know the contents thereof, and that the same is true of my own  
 knowledge, except as to the matters which are therein stated upon  
 information and belief, and as to these matters I believe it to be  
 true.

D. L. MURDOCK.

Subscribed and sworn to before me this 11th day of September,  
 A. D. 1898.

[SEAL.]

DAVID C. COLLIER,  
*Notary Public in and for the County of*  
*San Diego, State of California.*

That pursuant to the written stipulation of the parties to said  
 action, filed September 13, 1897, an order was entered by the court  
 on Dec. 20, 1897, *nunc pro tunc*, as of the 13th day of September,  
 1897, that the oath of any one of the defendants to the joint and  
 several answers of the defendants shall be treated as the oath of all,  
 and that the answers shall be treated as though sworn to by all.

That to the said answer so filed the said complainant, Chas. D.  
 Lanning, receiver of said San Diego Land & Town Company of  
 Kansas, filed, on September 22, 1897, the exceptions in words and  
 figures as follows, to wit :

(Title of Cause.)

*Exceptions Taken by said Complainant to the Answer of the said*  
*Defendants to His Bill of Complaint in This Cause.*

First. For that said defendants have not according to the best  
 of their information, knowledge, and belief set forth and discovered  
 in their answer relevant and material matters of facts showing or  
 tending to show that the matters alleged in the complainant's said  
 bill of complaint are not true or in confession and avoidance thereof,  
 but instead thereof have set forth in their said answer imma-  
 58 terial, irrelevant, and impertinent matter, and particularly  
 the following allegations contained and set forth in said answer,  
 to wit :

1. That part thereof commencing with the word "They," in line  
 4, page 4, of said answer, as follows :

"They deny that said corporation is or at any time was the owner  
 of any water or water rights or reservoir or any water system, as  
 alleged in the bill of complaint, except as hereinafter set forth, or  
 that it is or at any time was the owner of any water or water rights  
 or reservoir or any water system for or devoted to any purpose ex-  
 cept as hereinafter set forth."

2. That part thereof commencing with the word "And," in line  
 15, page 4, of said answer, as follows :

"And they say that said dam and reservoir are entirely on land constituting part of the bed of the Sweetwater river and on riparian land on both sides of said river contiguous thereto."

3. That part thereof commencing with the word "That," in line 19, page 4, of said answer, as follows:

"That said corporation became the owner in fee-simple of the ground occupied by its dam, reservoir, pipe lines, and conduits and all the real estate occupied by its water system by private grants to it from the owners thereof holding by mesne conveyances from the owners of the Mexican grants in said San Diego county, known as the Rancho de la Nacion and the Jamacha rancho; that it acquired the title to all the said land occupied by its reservoir prior to 1886 except a tract of three hundred and fifty-five acres in the extreme upper end of the reservoir, which it acquired in 1891 by grant to it from George H. Neale and wife, the then owners.

"That said Rancho de la Nacion contains 26,631.94 acres of land and has its western boundary on San Diego bay, a navigable water of the Pacific ocean, from whence it extends eastward about seven miles, and that the patent for said rancho was duly issued by the United States Government on February 27, 1866.

59 "That said Jamacha rancho adjoins said Rancho de la Nacion on the east and contains two square leagues of land; that the said grant was duly confirmed by the district court of the United States for California on March 9, 1858, and that the United States duly issued a patent conformably thereto.

"That the said Sweetwater river flows westerly through said Jamacha rancho, and, pursuing the said course, passes from it into said Rancho de la Nacion, and, flowing nearly through the center of said last-named rancho for about seven miles, has its mouth therein, where it empties into San Diego bay at the western boundary of said last-named rancho.

"That on the 9th day of June, 1869, Frank A. Kimball and Warren C. Kimball were, and for a long time prior thereto had been, the owners in fee of said National rancho and of all and singular the bed of the said Sweetwater river and of all the land on each side thereof and contiguous thereto in said Rancho de la Nacion from the eastern boundary thereof, being also the western boundary of said Jamacha rancho, downward, along and upon the said Sweetwater river to the place where it empties into the bay of San Diego.

"That afterwards, as early as the year 1881, said company acquired the title in fee of all the waters then flowing and thereafter to flow in said Sweetwater river in and through said Rancho de la Nacion, with the right to divert the same from its natural channel at any point or points in said rancho, by a regular chain of mesne grants and conveyances under a grant and conveyance of the same made by said Frank A. Kimball and Warren C. Kimball on said 9th day of June, 1869.

"That by reason of the premises the said company became the owner in fee-simple of all the water in and riparian rights on the said Sweetwater river and of the bed of said river from the highest



flowage point of its reservoir in said Jamacha rancho down to said San Diego bay, and that it acquired such ownership prior to the year 1886, except as to that portion thereof at the extreme upper end of said reservoir acquired from said Neale and wife in 1891, as aforesaid."

4. That part thereof commencing with the word "That," in line 5, page 6, of said answer, as follows:

"That pursuant to the provisions of title VIII of the Civil Code of California said company caused to be posted and recorded in Book One (1) of the Record of Water Claims for San Diego County notices each respectively of the appropriation of 5,000 inches of water of said Sweetwater river at the location of said dam; one of said notices in the month of September, 1886, recorded at page 171; one in the month of September, 1887, recorded at page 178; one in the month of April, 1887, recorded at page 248; all in said Book One (1).

"That each of said notices contained in the designation of the purposes for which the said water was claimed for the words following, to wit:

"The purposes for which said undersigned claims said water are to supply for culinary and irrigation purposes, the watering of live stock, and other domestic uses to the lands north and south of the Sweetwater river and adjacent thereto.

"That in the month of August, 1888, said company in its own name posted and filed for record a notice of appropriation of 75,000 inches of continuous flow of said Sweetwater river for the purposes set forth in said notice in words following, to wit:

"The purposes for which said water is claimed is to divert and distribute the same through pipes, flumes, ditches for the purpose of irrigation, domestic, manufacturing, and such other uses and purposes as may be practicable and expedient.

"But defendants aver that at the time of the filing and recording of each of said notices of appropriation and of the commencement of the construction of said irrigation system the riparian land on said

Sweetwater river and tributaries and the beds thereof above said reservoir were substantially all in private ownership, and almost none of said riparian land or beds of the streams were public lands of the State of California or the United States."

5. That part thereof commencing with the word "That," in line 10, page 7, of said answer as follows:

"That the location of said dam is across the channel of said Sweetwater river at a point within the boundaries of said Rancho de la Nacion about one-fourth of a mile west from the eastern boundary thereof, and is so located that the whole reservoir capable of being filled by the same is on lands so acquired by said company in said Rancho de la Nacion and Jamacha rancho.

"That the capacity of said reservoir is six thousand million gallons, and that the water system of said company covers and can supply about 9,000 acres of the 12,000 acres of territory thereunder, consisting of certain farming lands within and outside of said National City; and, in addition to supplying said 9,000 acres, can supply the domestic uses and needs of a population, when settled



upon said lands within and without said National City and on village property within said city, of 20,000 persons."

6. That part thereof commencing with the word "And," in line 29, page 7, of said answer as follows:

"And they deny that it is material or relevant that they should answer as to what sums of money were expended for such purposes."

7. That part thereof commencing with the word "Defendants," in line 8, page 8, of said answer as follows:

"Defendants each, except the defendants C. H. Rippey and M. L. Ward, admit that they are each the owners of tracts of land under the said water system of said land & town company, and that most of these defendants own and hold small tracts of only a few acres each, and they say that none of them own to exceed twenty-five acres irrigated from said system, except Warren C. Kimball, who owns about seventy acres, and that each of said defendants owns his and her tract in severalty, except as follows: The defendants Edward Gulick, William Gulick, and Henry Gulick own twenty acres of land as tenants in common, the defendants J. M. Howe and H. O. Howe own twenty acres of land as tenants in common, the defendants Arthur Ryan and Michael Mack own ten acres as tenants in common, and the defendants F. E. Leslie and H. P. Whitner own ten acres as tenants in common."

8. That part thereof commencing with the word "And," in line 1, page 9, of said answer as follows:

"And that each such water right and easement is in freehold and is a freehold-servitude imposed upon said water system for the benefit of the land to which it is appurtenant, and that all claims and demands of said company for the price or compensation therefor has been paid or otherwise satisfied by purchase or otherwise, as in the bill of complaint alleged."

9. That part thereof commencing with the word "Under," in line 13, page 9, of said answer as follows:

"Under the facts hereinafter set forth."

10. That part thereof commencing with the word "And," in line 18, page 9, of said answer as follows:

"And these defendants say that, of the said 12,000 acres of farming and orchard lands lying under said reservoir and within the reach of water supply therefrom, the said corporation, in January, 1887, owned, and for a long time prior, to wit, since the year 1869, had owned and held, for the purpose of sale, use, and profit, about seven thousand acres.

"And, further answering, these defendants say that the lands of said corporation owned by it in January, 1887, as hereinbefore stated, irrigable from its said reservoir and distributing system, as so constructed, are situate in the Sweetwater valley, in Chula Vista, and in National City, all within the boundaries of National ranch, in said city of San Diego; also in Otay valley, in said county, adjoining said National ranch on the south, and in the territory known as ex-Mission lands, adjoined to National City on the north, and that said lands, together with the said town lots owned

by said company as aforesaid, form virtually one continuous tract extending from near the base of the said Sweetwater reservoir westward to the bay of San Diego and from the Otay valley on the south to the municipal boundaries of the city of San Diego on the north and west thereof.

"That the lands, as owned in January, 1887, by others than the said company are in detached parcels scattered among said lands of the said company.

"And they say that said lands of said corporation were in January, 1887, entirely unsettled and in their wild and natural state, and were almost entirely arid and of but little value without water for irrigation.

"That the said lands belonging to others than said company were also at said date largely unsettled and in their wild and natural state, and were of the same general character with those of said company.

"And these defendants say that the said San Diego Land & Town Company acquired its said water, water rights, reservoir site, reservoir and distributing system for the purpose of devoting the same, first, to irrigate its own lands aforesaid and to supply the needs of inhabitants of said land who should be induced to purchase said lands from it as lands under irrigation and to settle on said lands.

"And that the object of said company in acquiring and constructing said water system was to enable it to sell its said lands as irrigated lands, with the easements of the perpetual flow and use of the water necessary and useful to irrigate the same, and to supply all the beneficial uses of the people who should settle upon them, annexed as appurtenants in freehold thereto, and to create the freehold servitudes upon its said water system corresponding to such easements.

64 "And defendants aver that said water, water rights, and said water system, to the extent necessary and useful for the irrigation of the lands of said company, became a part of said land and became merged in the estate of said company in said realty as one estate.

"And they say that, subject to the foregoing purposes, the said San Diego Land & Town Company devoted and appropriated the remainder of its said water, water rights, and the capacity and service of its reservoir and whole water system to the sale, rental, and distribution of the use of water to the public.

"And these defendants say that said land & town company, in part execution of its said and first primary purpose, object, and project for selling its own lands, laid out and platted its tract of lands known as Chula Vista, which consisted of about five thousand acres, in blocks of forty acres each, and bounded each such block by avenues and streets, and subdivided said blocks into lots of five acres each, and laid pipes through seven avenues therein, each about three miles in length and separated from each other one-fourth of a mile, and also pipes said Chula Vista at right angles with said avenues at the distance of every mile in the street crossing said avenue, and by said means said company's distributing system was

made sufficient to reach and serve with water each five-acre lot on said Chula Vista tract.

"And also reach its farming lands lying within the said city of National City, and extended pipes from its said system through said National City to serve and irrigate 390 acres of said ex-Mission lands outside and to the northward of the same, and that, in still further execution of said project, the said company laid pipes in the Sweetwater valley and elsewhere in National ranch, in the Otay valley, and in the tract known as ex-Mission, to reach and within reach of its said lands there situated.

65 "And, further answering, these defendants say that nine-tenths of the said company's distributing-pipe system aforesaid, when laid and ready for operation in February, 1886, was so laid in anticipation of future use and demand for water supply and not for any use or demand then existing, and that when laid it was, and to a great extent still is, ahead of the demands therefor, and that much thereof has laid unused."

11. That part thereof commencing with the word "And," in line 5, page 12, of said answer as follows:

"And, further answering, the defendants say that from the time when said corporation entered upon the enterprise of constructing said water system it has at all times advertised in print and in writing subscribed by it and held its said farming and orchard lands for sale, and up to January 1st, 1896, did, as an inducement to the purchase thereof, both privately and publicly and continuously, in writing subscribed by it and otherwise, represent that the water of its said system was piped to and over said lands and lots and was and would be supplied to purchasers thereof in abundance for irrigating the same at the rate of \$3.50 per acre per annum for farming and orchard lands."

12. That part thereof commencing with the word "And," in line 16, page 12, of said answer as follows:

"And, further answering, these defendants say that the said corporation since the early portion of the year 1887 and up to January 1st, 1896, had at all times kept its said lands continuously on the market for sale, with and under said representations as to water supply thereof and as to the annual rate for the same for irrigation."

13. That part thereof commencing with the word "And," in line 22, page 12, of said answer as follows:

66 "And, further answering, these defendants say that the lands of said corporation situated in the Sweetwater valley, in the Otay valley, and in the ex-Mission, consisting of about 5,700 acres, without the appurtenant water supply under said system, have at no time been worth more, in case purchasers could be found, than an average of \$35.00 per acre, and that its lands in Chula Vista, comprising about 5,000 acres, as aforesaid, as so laid out and platted, without the appurtenant water supply under said system, have at no time been worth more, in case purchasers could be found, but rather less, than an average of \$75.00 per acre, and that its lands other than town lots situated within said city of National City, comprising about 900 acres, without the appurtenant

water supply under said system, have at no time, in case purchasers could be found, been worth more, but rather less, than an average of \$100.00 per acre.

"That by reason of said appurtenant water supply the said corporation regarded and treated the value of said lands and lots as proportionately enhanced, and that accordingly it has at all times since early in the year 1887 held its raw lands, including the annexed perpetual easement water supply from its said water system, in said Sweetwater valley, in said Otay valley, and in said ex-Mission, at an average of \$250.00 per acre, and has at all times held its raw lands in Chula Vista, with the said annexed water supply, at prices ranging from \$300.00 to \$500.00 per acre, except that it offered and sold about six five-acre tracts of its Chula Vista lands at \$150.00 per acre as an inducement to the first few purchasers to locate thereon, and has at all times held its lands within said city of National City, together with the water supply annexed, at \$350.00 to \$500.00 per acre, and has held its lands, where improved by it with the aid of said appurtenant water supply, outside of the value of improvements, on the same basis of valuation for the land and water."

14. That part thereof commencing with the word "And," in line 21, page 13, of said answer as follows:

"And these defendants, further answering, say that, at said prices and under said representations that the annual rate for water for irrigation was and would be \$3.50 per acre, said corporation  
67 had, up to the date of the filing of the bill of complaint herein, sold to certain of the defendants and their predecessors in title severally parcels of said irrigated lands outside of National City aggregating about twelve hundred acres, with the freehold easement of water supply annexed as an incident and appurtenant to the land granted, and that in cases of the purchase of each such parcel of land each purchaser thereof respectively relied upon the said representations of said corporation that the annual rate for water to be supplied for irrigation was and would remain not higher than \$3.50 per acre, and that in each case of such parcel of land so sold said corporation, prior to making its conveyance of the same to purchasers, connected said lands with the actual flow of water from said system, both for irrigation and domestic and other uses for persons and animals thereon, and, in respect of lands in said Chula Vista so sold by said corporation, that it exacted from and imposed upon each of said purchasers of a tract from it his obligation to erect a residence house thereon at once to cost not less than \$2,000.00."

15. That part thereof commencing with the word "And," in line 10, page 14, of said answer as follows:

"And these defendants, further answering, say that up to December, 1892, said corporation made no express or separate grant of 'water rights' as appurtenant to such of said land up to that time so sold by it to certain of these defendants, but granted the easement of the flow and use of water from its said system as an appurtenant to the land sold and granted with such land after it had

been connected with the said water system and after the said flow and supply of water had been applied to irrigate the land so sold and to the uses of persons living and animals kept thereon, and contracted for and received compensation for the land and appurtenant water right in a single price for both.

68 "That after December, 1892, said corporation, in all cases where it sold of its said lands, did, by an express contract in writing, specifically sell to those of the defendants who purchased lands from it after that date the appurtenant water right, and that each of such contracts contained the following provisions (the description of the land and the price for the same, with the water, being adapted to each case), to wit:

"That in consideration of the stipulation herein contained, and the payment to be made, as hereinafter specified, the party of the first part, (said corporation) hereby agrees to sell unto the party of the second part, and the party of the second part agrees to purchase of the party of the first part, the following real estate, to wit:" (Description) "Together with a water right to the one-acre foot of water per annum for each and every acre of said above-described real estate, to be delivered by the party of the first part through its pipes and flumes at a point — said water to be used exclusively on said real estate, to become and be appurtenant thereto, and not to be diverted therefrom. Provided, that the party of the first part may change the place of delivery of said water, so long as the same is near the highest point of land. For which land and water right the party of the second part agrees to pay the sum of — dollars.

"And the party of the second part further agrees and binds —self — heirs, executors and assigns, to pay the regular annual water rates allowed by law and charged by the party of the first part for the water covered by said water rights, whether said water is used or not, and to pay for all water used on said land for domestic purposes, monthly, under such rules and regulations for the delivery of water to consumers as the party of the first part may from time to time make.

"And these defendants say that in the character and quality of the appurtenant water rights connected with the land sold by said corporation, as aforesaid, no discrimination exists or has at  
69 any time been claimed by said corporation or has at any time been recognized by said purchasers between the lands so sold by it after the inauguration of said water system up to December, 1892, and those sold by it after that date with the express and specific provisions as hereinbefore set forth."

16. That part thereof commencing with the word "And," in line 28, page 15, of said answer as follows:

"And these defendants, further answering, say that the title to the lands of certain of them, to the aggregate of about nine hundred acres, lying outside of said National City, was not derived from said corporation; and in respect of such lands they say that said corporation furnished water for the irrigation of so many of such land as came into cultivation up to December, 1892, without exacting a price for a water right, but voluntarily annexed the perpetual ease-

ment of the flow and use of water from said system to said lands, and voluntarily, in all respects, has from the beginning of its water service treated and still does treat the same as to water rights in all respects on the same footing as the lands sold by it to other of these defendants or their predecessors in interest, as hereinbefore alleged, and that from the beginning of its water service, in 1887, until now the annual water rates actually established and collected by said corporation for water furnished by it to land not sold by it have been the same as for water supplied to lands sold by it."

17. That part thereof commencing with the word "And," in line 14, page 16, of said answer as follows:

"And defendants, further answering, say that from and after said date of December, 1892, said corporation refused to furnish water to irrigate other or further lands under said system not owned or sold by it except upon the payment of a sum in gross for the water right over and above the uniform annual rate as actually established and

collected from all lands under the system, or, in lieu thereof, 70 of six per cent. annual interest upon its estimate of the value of such right.

"That it first fixed the price of such water rights at \$50.00 per acre, and later raised the same to \$100.00 per acre, and that after the same date of December, 1892, it furnished no water to irrigate any lands not sold by it except upon payment of the price fixed by it for a water right under a contract for the sale of such water right containing the following provisions (the filling of the blanks being adapted to each case), to wit:

"That the party of the first part (said corporation) agrees to and does hereby sell to the party of the second part a water right to one acre foot of water per acre per annum, for each and every acre of the real estate hereinafter described, to be delivered through the pipes and flumes of the party of the first part for the sum of — dollars, payable as follows: —; provided the party of the first part, may, at its option, change the place of delivery of said water, so long as the same is near the highest point on the lands for which the water is delivered under and in accordance with the rules and regulations established from time to time by the party of the first part. Said water right is sold for the use of and to be appurtenant to the following-described real estate now owned by the party of the second part, in the county of San Diego, State of California, to wit: —, consisting of — acres.

"And it is expressly understood and agreed that the water right hereby sold shall belong to said described real estate and be used thereon, and not diverted therefrom or used on any other lands.

"In consideration of the foregoing stipulations and agreements, the party of the second part agrees and binds —self, — heirs, executors and assigns, to pay the sums above specified promptly as the sums, and each of them falls due, and that — will in all things comply with and perform the terms and conditions of this agree-

ment on — part to be performed, and that — and they 71 will promptly pay all annual water rates and charges for the water to which — is entitled under and by virtue of this



agreement at rates fixed by the party of the first part as allowed by law, and at the times, in the manner, and according to the rules and regulations made and adopted by the party of the first part, the annual rental for the amount of water to which the party of the second part is entitled under this contract, to be paid whether the same is used or not, and also to pay for all water used by — on said land for domestic purposes at the rates fixed by the party of the first part and allowed by law.

“And that said company annexed under said form of contract the water rights referred to in the bill herein, which are appurtenant to about 400 acres of the lands of certain of these defendants.

“And that said corporation at no time has made or claimed and does not now make or claim any distinction in respect of the character and quality of the water right or of the annual rates actually established or collected for irrigation between such of the said lands not purchased from it as are furnished with water for irrigation by it, whether under such special contract for water right or without.

“And these defendants say that the defendant J. M. Ballou owns his water right, alleged in the complaint, by virtue of a special written contract with said corporation making such water right appurtenant to his land for a valuable consideration by him paid to said corporation and under the provisions as to rates in the words, to wit:

“Provided, that said party of the second part shall make application in the form provided by the company, for the use of the water, and use the same under the same restrictions and conditions, and to pay said party of the first part the current rate therefor, as established for Chula Vista; provided, said restrictions and conditions are not inconsistent with the water right hereby granted to said party of the second part.”

“And these defendants further say that of their number the owners of the lands to the amount of about 400 acres, which lie in said ex-Mission and which have annexed to them water rights, as in the complaint alleged, entered into a written contract with said corporation for the use and flow of said water to said lands, and that said contract contains the following provisions:

“The parties of the first part will make application for the use of the water upon the form provided by the party of the second part for that purpose, and pay for the use of the water at the current rates as may be enforced from time to time for supplying lands in National ranch, and subject to the same general rules and regulations.”

18. That part thereof commencing with the word “And,” in line 2 of page 19 of said answer, as follows:

“And, further answering, these defendants say that on or about June 3rd, 1895, said corporation established a classification of lands which has been or which should be provided with water by its system to take effect July 1st, 1895, and afterwards confirmed the same to take effect January 1st, 1896, and that said classification

has been adopted by the complainant receiver and is in words following, to wit:

"Tenth. For the purpose of fixing rates for irrigating acre property, the lands of that character are classified as follows:

"All lands to which the easement and flow of water for irrigation has been or shall be annexed by the consent or voluntary act of this company shall constitute the first class.

"All lands to which the easement and flow of water for irrigation has not been or shall not be annexed by the consent or voluntary act of this company shall constitute the second class."

"And in respect of said second class of lands it at the same time promulgated the following, to wit:

73 "In addition to said annual rate for water used upon lands of said second class there shall be paid upon the lands of said class an annual charge equal to six (6) per centum of the value of the right to said easement and flow of water for irrigation; which said value is to be taken as one hundred dollars (\$100.00) per acre."

"And these defendants say that the lands of each and all of the defendants fall within the first class so defined by said corporation and said receiver."

19. That part thereof commencing with the word "And," in line 28 of page 19 of said answer, as follows:

"And these defendants further say that said corporation has planted and improved other considerable tracts of its said lands still owned by it, aggregating about 1,500 acres outside of said National City and about 75 acres within said city, and has used and is using thereon water supplied from its said system as appurtenant to said land and for cultivating the same, and also holds said lands, with such appurtenant easement of water supply, for sale, and that said corporation retains the remainder of its said lands under said system—comprising about 4,000 acres, to which water has not actually been applied—at valuation not less than hereinbefore stated for raw land, with the incident and easement of water supply annexed, and has refused and at all times refuses to dispose of the same without including said water supply, except on the conditions that purchasers would pay to complainant the price for said lands so fixed by it, and to include the price of a water right or interest at six per cent. per annum on the price of such water right, at the option of the purchaser."

20. That part thereof commencing with the word "And," in line 21 of page 20 of said answer, as follows:

"And they say that in the classifications aforesaid made by said corporation and its receiver no discrimination is made or at any time has been made between lands of the first and second

74 class in respect of the annual rate, and that the said additional charge of six per cent. per annum upon the value of such water right applies only to such lands as shall receive the use and flow of water from said system for irrigation upon demand of their owners to share in that part of the said waters appropriated by said corporation to the public use in the cases where the owners



shall not have paid or secured to be paid, by contract or convention with said corporation, the gross sum demanded by it for the sale and conveyance of the water right for such lands, and they say that none of the lands of these defendants now under irrigation fall within the second class.

"And these defendants say that they have each accepted and concurred in and do accept and concur in the said classification of lands as made by said corporation and receiver, and that the same has become established, and that the same is just, equitable, and reasonable as between said corporation and all the land-owners under said system."

21. That part thereof commencing with the word "And," in line 9 of page 21 of said answer, as follows:

"And these defendants say that the aggregate number of acres of land now under irrigation from said system, including those of these defendants of said corporation and of all others, does not exceed 4,300 acres or one-half of the capacity of the reservoir and distributing capacity of the main pipe lines of said corporation after allowing for the domestic uses of 20,000 persons, and that about 800 acres of said land so irrigated lie in National City.

"And these defendants further say that neither of them know, and that neither of them has been informed, save by complainant's said bill and the statements of said corporation, what is the actual annual expense of operating and keeping in repair the said reservoir and water system of said company and furnishing its consumers with water, exclusive of the alleged interest of seven per

75 centum of \$300,000.00 of the bonds of said corporation referred to in said bill, but that upon such information they are informed and believe, and therefore allege, that the said annual expenses do not exceed the sum of \$12,034.99, as stated in the bill of complaint herein.

"And they aver that the 'natural and necessary depreciation of its system' referred to in the bill of complaint is made good by the keeping of the same in repair, the cost of which is included in the annual charges, and they say that, as shown by the books of said corporation and its official reports, the aggregate, under the head of its accounting for 'water service,' 'maintenance of pipe lines,' 'maintenance of Sweetwater dam,' and 'expenses' for the years ending December 31st, 1890, 1891, 1892, 1893, and 1894, were respectively \$8,015.48, \$13,002.46, \$11,395.17, \$11,410.48, and \$7,850.18.

"And, answering upon such information, they allege that the amounts so actually realized from the whole system for water rentals alone, exclusive of any proceeds of the sale of water rights during said year, did not fall below \$25,715.00, and they say that at the same rates the amount that will be realized by said corporation from the annual rentals under said system, exclusive of any sums derived from the sale of water rights, will not, for the year ending January 1st, 1897, fall below \$27,000.00; and the defendants say and each of them says that the amount of \$25,715.00 was collected as water rentals for the year ending January 1st, 1896, for the several purposes for

which water was used from the said company's system, with the irrigation rate fixed at three and one-half dollars per acre per annum, and that the sum of twenty-seven thousand dollars is the measure of the yield for the year ending January 1st, 1897, from the said rentals, with the rate for irrigation fixed at the same annual rate of \$3.50 per acre, and with but two-thirds of the capacity of said system in use.

76 "And they further say that the said amounts actually realized annually from water rents under said system are derived from sums paid in respect of the lands owned by others than the said corporation and the rentals attributed to the lands owned by said corporation actually under irrigation, and that no part thereof has at any time been derived from or attributed to the lands of said corporation, whether still owned by it or heretofore sold by it, so long as the same were not or still are not actually irrigated."

22. That part thereof commencing with the word "And," in line 30, page 22, of said answer, as follows:

"And defendants further say that they are informed by the records and official reports of said corporation, and therefore aver the fact to be, that on January 31st, 1894, the net balance of its actual receipts from water rentals, based on collections actually made from lands actually irrigated, both those sold and those never owned by the company, and sums charged to lands owned by the company actually irrigated from February, 1888, to said December 31st, 1894, accumulated in its hands to the credit of said water system, after deducting the items of 'expenses,' 'maintenance of pipe line,' and 'maintenance of Sweetwater dam,' was \$49,699.28.

"But they say that said net balance to the credit of said water company's department on said December 31st, 1894, does not include any charge, rate, or assessment to the lands of said corporation which at any time were not or that now remain unirrigated."

23. That part thereof commencing with the word "But," in line 15, page 23, of said said answer, as follows:

"But these defendants, further answering, say that they deny that said corporation is entitled to demand or receive from these defendants any sums whatever by way of water rentals in behalf of or to apply upon the said demanded income of six per cent. or any net income on the alleged cost of said water system.

77 "And they deny that they or either of them own their said water rights in and under said water system, subject to any obligation, legal or equitable, other than such as arises from the actual rates established as aforesaid and collected by said company, which in case of their lands is \$3.50 per acre per annum.

"And they deny that the compensation to said corporation for either of their respective water rights, easements, or servitudes aforesaid were or are still subject to regulation by any board of supervisors of this State, as provided by said act of 1885."

24. That part thereof commencing with the word "They," in line 29, page 23, of said answer, as follows:

"They aver that such of their number as have purchased their

said lands, with water rights appurtenant thereto, from said corporation and such of their number as have purchased of said corporation water rights made appurtenant to their lands not bought of the corporation have each and all paid the full amount demanded by said corporation as the price of the perpetual easement of water supply from said company's water system by said company granted and annexed to such lands. They aver that such easements are respectively servitudes upon said company's water system and have been fully paid for, and that the owners of said lands are forever discharged and acquitted from payment of any further sum or sums to apply on the principal of or as income upon the cost or value of said water system or any debt incurred by said corporation for construction thereof or the value of their respective water rights.

"And they allege that said company, in each of said cases where water was devoted to the public use, received satisfaction for, from, and parted with to each of said defendants or to his or her predecessor in interest all right to demand and collect water rentals proportioned to said lands as corresponded or related to interest or income on the cost or value of said system or to net annual receipts and profits thereon or therefrom.

78 "And that in said respects it has at all times put all other lands to which it has voluntarily annexed said water rights upon the same footing, and that all such lands have remained on the same footing for more than five years; that said lands have in many cases changed owners while so supplied with water at the same rates and on the same footing as to water rights with the land sold by the said company with annexed water rights aforesaid; that the value of said water rights has for more than five years entered into the market value of said lands, and has in all cases been paid for to their vendors by the present owners, these defendants, who are successors in title by mesne or immediate conveyances of the lands to which during the former ownership the company voluntarily annexed said perpetual easement and water rights, and that neither any such lands nor the owners thereof are in any event liable for any other or further water rentals than are the lands the ownership of which, with said water rights, were derived from said corporation."

25. That part thereof commencing with the word "And," in line 13 of page 25 of said answer, as follows:

"And these defendants each say that said annual rate of \$3.50 per acre is the only actual rate which has ever been established, or that has ever been collected by said corporation, or which has at any time been paid or assented to by the consumers under said system from the said beginning of its water service down to the time of filing the bill of complaint herein.

"That said rate so actually established and collected has during more than nine years last past been uniform as to all the lands actually irrigated under said system, and defendants say that it has been uniform and without discrimination in respect of all the lands of these defendants at all times.

"And these defendants further say that they were induced to pur-

79 chase, improve, and settle upon their said respective parcels of land in reliance upon the fact that said rates of \$3.50 per acre per annum for irrigation under said system has during all said period of time been uniformly and actually established and collected by said corporation, and they aver that said irrigation rate has entered into the value of all the land of these defendants and is a material element of such value.

"They admit that no other person or corporation is or ever has been furnishing a supply of water to said defendants and other consumers, and that there is not now, nor has been, any other system of water works by which said defendants can be furnished with water."

26. That part thereof commencing with the word "And," in line 4, page 26, of said answer, as follows:

"And these defendants deny that the capacity of said water system is only sufficient to supply water to not exceed seven thousand acres, together with the domestic uses of a population of twenty thousand persons."

27. That part thereof commencing with the word "And," in line 10, page 26, of said answer, as follows:

"And they deny that at the rate of \$3.50 per acre, if water should be demanded and used upon the whole of the lands which the system is able to supply with water, and rates are allowed in said National City equally high for domestic uses and irrigation, said company would not be able to pay its operating expenses and maintain, from such rentals, its plant and system; they deny that said company has been, or still is, under said established rates, losing money every or any year; they deny that its said plant and system has been, or is, gradually going to decay from natural depreciation consequent upon its use in supplying consumers with water, without any or sufficient resources or means provided for said rates for replacing the same; they deny that said company, if said rate of \$3.50 per acre is maintained, will be compelled to furnish  
80 water to consumers at any actual or continuous loss; and they deny that if the rentals derived from said system, at the rates actually established and collected, including said rate of \$3.50 per acre, are fairly applied to manage, operate, and maintain the same, that said system will be lost."

28. That part thereof commencing with the word "They," in line 18 of page 27 of said answer, as follows:

"They deny that \$7.00 per acre per annum, or any sum in excess of \$3.50 per acre per annum, is a reasonable rate for these defendants, as consumers, to pay; they aver that each of them is owner of a right and easement in freehold of the flow and use of water through the water system of said company, as in the bill of complaint alleged, and that the same is appurtenant to their respective lands, and that their lands fall within the first class established by said corporation; and that from them said company is not entitled to any interest on its investments in said plant; and they aver, that the sum of \$3.50 per acre per annum for the use and enjoyment of said easement and the maintaining and operating of

said system has been actually established as aforesaid, and is the only rate which has been collected by said corporation for the nine years last past from these defendants and their privies in the title to their said lands, and that no other rate has ever been actually established in respect of their lands, or at any time collected; and that said rate is the ample and sufficient contribution of said lands for the maintenance of said works."

29. That part thereof commencing with the word "And," in line 4 of page 28 of said answer, as follows:

"And these defendants aver that they and each of them, respectively, and their predecessors in estate, owners of the said several tracts of land now held and owned by the said defendants, have for

81 more than five years prior to the first day of January, 1896, continuously held and enjoyed the use of the said waters upon their said lands for irrigation purposes, paying therefor the annual sum of \$3.50 per acre, and that such use and enjoyment has been open, notorious, continuous, adverse, and uninterrupted, and that they have thereby acquired the right to have and enjoy said water for the purpose of irrigating their said lands, paying therefor the said annual sum per acre, and that said right has become vested in them by such use under the said deeds of conveyance and representations and assurances, as aforesaid, and by the operation of section 318 of the Code of Civil Procedure of the State of California, and that they are entitled to have and use the said water from the said works, paying therefor the said sum per acre per annum, and no more."

30. That part thereof commencing with the word "And," in line 20, page 28, of said answer as follows:

"And these defendants aver that the said corporation is barred from having or maintaining any action at law or in equity to change the character of or add to the burden of said easement or to increase the said annual payment for the use of the said water, and is estopped to assert, claim, or exercise any right to change the said annual payment."

31. That part thereof commencing with the word "And," in line 15 of page 29 of said answer, as follows:

"And they say that said notice contained the further demand, as a condition to the refraining by said company from interfering with and shutting off the water supply of each of these defendants under their respective easements and water rights aforesaid, that the defendants each subscribe and execute an instrument upon a certain printed form designated 'Application for water,' which contained the following words and figures:

'NATIONAL CITY, CAL., — —, 1896.

To the San Diego Land & Town Company:

82 The undersigned hereby applies for a permit to connect service pipes with the mains of the company and for water service under the rules and regulations of the San Diego Land & Town Company, which are expressly made the basis for the appli-

cation and which he agrees to observe for the following purposes and at the following rates for the year ending June 30, 1896.

No.	Monthly rate.	Annual rate.	Total.	Date.
	Family of four persons.			
	Additional persons.			
	Bath.			
	Water-closet.			
	Horses.			
	Horses.			
	Carriages.			
	Cows.			
	“			
	Lot and block property.			
	Lots.			
	“			
	“			
	Irrigated land.			
	Acres.			
	“			
	“			
	Interest charges.			

Total annual rate for the year ending June 30, —, which I agree to pay, quarterly in advance, at the office of the San Diego Land and Town Co.

The water to be furnished under this application to be used on the following land or property :

Lot.	In block.	$\frac{1}{2}$ sec.
National City.		
National ranch.		
Ex-Mission.		

83 More fully described as follows :

The location of the *top* is on — side of — avenue,  
street,

between — and — avenues.

This contract shall remain in force until the first day of next July, when it may be terminated at the request of either party, notice to be served in writing ; but in case no such request is made, then the same shall continue in force for one year, thereafter, and so on from year to year until such request is made ; which request, when made, shall be to terminate this contract on the following July first.

Provided, that if the water is furnished under this application after June 30th, 1896, the same shall be paid for at the rate fixed by the proper authorities, or the rules of the company, for the year the same is furnished, and subject to the rules and regulations of the company, the same to be payable quarterly, unless otherwise provided by said rules and regulations.

Applicant : — — —

SAN DIEGO LAND & TOWN CO.,

By — — —."

32. That part thereof commencing with the word "And," in line 9 of page 33 of said answer, as follows:

"And they aver that said rate of \$3.50 per acre per annum established by said corporation, as set forth in the bill of complaint herein, is the only actual rate for irrigation which has ever been established and collected by said corporation or said receiver, and they aver that the same is the only rate which ever has been legally established or which is to be deemed or accepted as having been legally established by said corporation therefor.

"And these defendants deny that any increase of the rate for such rentals is at all necessary to enable said corporation or its receiver to maintain and operate said plant and pay the proper expenses of such maintenance and operation thereof."

84 33. That part thereof commencing with the word "They," in line 28 of page 33 of said answer, as follows:

"They admit that their rights are the same to the extent that all are freehold easements, as aforesaid, and that the determination of the question of the right of said land & town company and of complainant to increase the rate of rental to be charged and collected will affect all of these defendants in the same way and to the same extent, except that the quantity of land owned by the several defendants is different."

34. That part thereof commencing with the word "But," in line 12 of page 34 of said answer, as follows:

"But the defendants each say, relating to the jurisdiction of this court of the said action against each defendant severally, that on and for a long time prior to January 1st, 1896, there was in force a rule adopted by the San Diego Land & Town Company, which was also adopted by said complainant as its receiver, as follows:

"1. All rates are payable at the company's office, and in all cases, except where the supply is taken through a meter or counter, will be collected in advance and within — (15) days of becoming due, as follows: For miscellaneous and domestic purposes, January, July, and October 1st, in quarterly payments.

"6. In case of non-payment of the water rate within fifteen (15) days after becoming due the supply will be discontinued and will not be again renewed until full and satisfactory settlement of all arrearages shall be made, together with the sum of one dollar for turning on and off."

"That under said rule, on January 4th, 1896, being the time of the filing of the bill of complaint herein, the demand of complainant for increase of rentals 'to enforce the payment' of which complainant caused the water to be shut off from the premises of each of these defendants until such demand demanded increase of rentals should be paid, as set forth and stated in the bill of complaint, was for the quarter year beginning with January 1st, 1896, and no longer; that no rental or compensation of any kind had accrued or become due or payable to complainant at the filing of the bill herein except for the said first quarter of said year.

85 "That such demanded increase of rental for any quarter of the year beginning January 1st, 1896, would, in case of no defendant or



defendants associated as partners, be as much as \$2,000.00, but in each case very much less than that sum, and in case of the defendant having the largest number of acres of land irrigated under said system would not equal \$58.00, and in case of no other as much as \$35.00, and of most others not to exceed \$3.75 each."

35. That part thereof commencing with the word "And," in line 13, page 35, of said answer as follows:

"And these defendants, further answering, say that they have no information, except as derived from the complainant's bill, from the solemn admission of said corporation, and from the records of the recorder's office of the county of San Diego, State of California, as to whether said corporation did borrow \$300,000.00 and as to whether it is compelled by pay thereon \$21,000.00 interest annually, or what portion of the said principal sum it applied to the acquisition and construction of its water system, and they deny that it is material for them to further answer any allegation with respect thereto."

36. That part thereof commencing with the word "And," in line 23 of page 35 of said answer, as follows:

"And these defendants, further answering, say that they each have at all times since January 1st, 1896, paid the rate or rental of \$3.50 per acre per annum to the complainant, as such receiver, and are willing and offer to pay the same as long as it continues to be legally established."

37. That part thereof commencing with the word "And," in line 28 of page 35 of said answer, as follows:

"And, further answering, these defendants say that the statute of the State of California of 1885 referred to in the bill of complaint and in this answer of these defendants, in so far as it purports to prohibit the said company from selling, disposing of, or alienating servitudes in freehold upon its said water system or its said property used or useful to the appropriation or furnishing of water, or to prohibit said company from contracting respecting the same, or from receiving full payment, satisfaction, or compensation therefor from any consumer willing to contract, purchase, and pay for the same, and in so far as said statute prescribes that such servitudes shall be enjoyed by the owner of the land to which the same are annexed as easements only upon the terms and conditions that such owners render net annual receipts and profits upon the value thereof in perpetuity, and in so far as said statute purports to prohibit said company and the consumers of water under it from the making of contracts by and between said company and water consumers respecting the annual receipts, profits, and income of any of said property, or to extinguish and satisfy and make acquittance of any right of said company to such net annual receipts, profits, and income, and in so far as such statute prohibits any of the contracts in this answer set forth relating to the sale, transfer, or vesting of the flow and use of water in freehold annexed to the land of the respective defendants herein, and in so far as it prohibits the sale, transfer, and vesting of the ownership of the water rights in the bill of complaint referred to in these defendants respectively and



from becoming annexed to their respective parcels of land, the same is unconstitutional and void as being in conflict with the XIV amendment of the Constitution of the United States, in that  
 87 such statute would deprive said company and these defendants of their liberty without due process of law and would deny them and each of them the equal protection of the laws, and as being in conflict with the declaration of rights contained in section one of the constitution of the State of California, and which said section is in words and figures following to wit:

*“Article 1, Declaration of Rights—Inalienable Rights.*

“SECTION 1. All men are by nature free and independent, and have certain inalienable rights, among which are those of enjoying and defending life, liberty and property, acquiring, possessing and protecting property, and pursuing and obtaining safety and happiness.”

“And as being in conflict with article twenty, section nine, of the constitution of the State of California, which is as follows:

“SECTION 9. No perpetuities shall be allowed, except for eleemosynary purposes.”

38. That part thereof commencing with the word “And,” in line 7 of page 37 of said answer, as follows:

“And each defendant for himself says that his liability to pay rentals or charges of any kind for the service of said system is several and not joint, except only in the case of said defendants associated as partners, which is joint only as between such partners.

“And the defendants say that the following defendants, among others, are not inhabitants or residents of the State of California and are not competent to make petition to the board of supervisors, as provided in section 3 of said act of 1885, to wit:

“T. M. Eaton, Charles Mohnike, the heirs of Schulenburg, deceased; E. J. Elliott, H. E. Klammer, D. S. McBean, Edwin S. Belcher, J. W. Stearns, N. J. Pillsbury, Mary D. Klammer, Arthur Ryan and Michael Mack, L. V. Wright.

88 “And they say that the following-named defendants are public-school corporations and not tax-payers of any county of this State:

Chula Vista School District, Sunnyside School District, Sweetwater School District, and for said reasons are not competent to make such petition.

“And the following-named defendants, among others, are not inhabitants of said county of San Diego, to wit: Edward Gulick, William Gulick, and J. O. Rhinehart, and for said reasons are not competent to make such petition.

“And said defendants, so being incompetent to petition the board of supervisors, as provided by section 3 of said act of 1885, say and all the defendants say that they have no power to compel any sufficient number of competent inhabitants who are tax-payers to join in a petition to the board of supervisors, as provided in said section 3 of said act.”

39. That part thereof commencing with the word "And," in line 3 of page 38 of said answer, as follows:

"And these defendants say that said statute of the State of California approved March 3rd, 1885, in so far as it assumes or purports to authorize or empower said San Diego Land & Town Company or said receiver to increase, as is alleged in the bill of complaint, said rate of \$3.50 per acre per annum heretofore actually established and collected from the defendants without the consent of the defendants and each of them, is in violation of section one of article XIV of the amendments of the Constitution of the United States, and deprives each of them of his and her property without due process of law and denies to each of them the equal protection of the law."

40. That part thereof commencing with the word "And," in line 14 of page 38 of said answer, as follows:

89 "And these defendants further say that, in so far as said statute of 1885 purports to authorize or empower said land & town company or its receiver to shut off or to justify them or either of them in their act, as set forth in the bill of complaint, in shutting off the water from the lands of these defendants or either of them, or to deprive these defendants or either of them of the enjoyment of their said water rights and of their said easements of the flow and use of such water for the irrigation of their said respective tracts of land as a means of enforcing against these defendants the collection of the increase of rental demanded in the bill of complaint or any increase made without consent of these defendants of the said rate of \$3.50 per acre per annum heretofore actually established and collected from these defendants, and in so far as said statute purports to permit or authorize such enforced collection without permitting these defendants to have any standing in this court to contest the reasonableness of said increase of rates, and in so far as it purports to empower this court or any court to enjoin these defendants or any of them from contesting the reasonableness of said increase of rates in any court, the same is unconstitutional and void as tending to deprive and depriving these defendants and each of them of their property without due process of law, and as tending to deprive and depriving them and each of them of the equal protection of the laws is in violation of section one of the XIV amendment of the Constitution of the United States."

41. That part thereof commencing with the word "And," in line 7 of page 40 of said answer, as follows:

"And these defendants humbly submit and insist that the rate of rental for irrigation of each of their said parcels of land ought not to be changed or altered from the rate of \$3.50 per acre per annum, being the rate and rental actually established and collected by said San Diego Land & Town Company and said receiver, as aforesaid."

42. That part thereof commencing with the word "And," in line 19 of page 40 of said answer, as follows:

90 "And these defendants aver and each of them avers that the acts of said receiver, as set forth in the bill of complaint,

in undertaking to raise the said rate of \$3.50 per acre per annum for irrigation to \$7.00, and in shutting off the water supply, as in the bill of complaint alleged, are and each of them is in violation of article V of the amendments of the Constitution of the United States, as acts done under a color of authority of the United States, tending to deprive and depriving these defendants and each of them of their property without due process of law."

43. That part thereof commencing with the word "And," in line 28 of page 40 of said answer, as follows:

"And these defendants, as matter of supplement to their said answer, state that the legislature of the State of California, at the session thereof held in 1897, passed an act entitled 'An act to amend an act entitled "An act to regulate and control the sale, rental, and distribution of appropriated water in this State other than in city, city and county, or town therein, and to secure the rights of way for the conveyance of such water to the place of use," approved March 12th, 1885, by inserting a new section therein relating to contracts for the sale, rental, and distribution of water, and the sale or rental of easements and servitudes of the right to the flow and use of water,' and which said act was duly approved by the governor of the State of California on the 13th day of March, 1897, and thereupon immediately went into effect.

"And defendants further aver that the addition so by the said amendment made to the said act was a section numbered 11½, and which said section is in the words following, to wit:

"SECTION 11½. Nothing in this act contained shall be construed as prohibiting or invalidating any contract already made, or which shall be hereafter made, by or with any of the persons, companies, associations or corporations described in section two of this act, relating to the sale, rental or distribution of water or to the sale or rental of easements and servitudes of the right to the flow and use of water; nor to prohibit or interfere with the vesting of rights under any such contract."

44. That part thereof commencing with the word "And," in line 20 of page 41 of said answer, as follows:

"And these defendants further aver upon information and belief that by virtue of the said provisions of the Constitution of the United States and of the State of California and under and by virtue of the act of the legislature of March 13, 1897, before mentioned, these defendants and each of them had the right to enter into the contracts with the said San Diego Land & Town Company herein set forth, and the said contracts are valid and effectual, and that the said complainant had no right to make such increased charge for the use of water as aforesaid."

Second. That the defendants by their said answer aver and claim that they have by purchasing lands from the said San Diego Land and Town Company and by the purchase of water rights from said company returned to it a part of its principal invested in its said water works, and that therefore they should not be required to pay rates upon a basis of allowing to said company any interest on the amount of principal so advanced or returned to it, but said answer

is evasive and uncertain, for that it does not show which, if any, of said defendants have so paid or advanced any of the said principal or how much thereof, if any, has been paid or returned to said company by all of said defendants.

Third. That it is admitted by said answer that the actual and just cost of the water works and system of said San Diego Land and Town Company is \$750,000.00, and the law of the State of California allows said company as a reasonable return on said investment the sum of not less than six nor more than ten per cent. not on the said value of said plant and system, and it affirmatively appears from said answer that the annual rental of \$7.00 per acre per annum will not and cannot realize to said company said sum of six per cent. net per annum allowed it by law.

Fourth. That with respect to all of the matters and things in said answer set forth, other than the allegations hereinabove set forth as irrelevant and impertinent, the denials and averments contained in said answer are evasive, imperfect and insufficient, and fail, either separately or as a whole, to show that the matters and things set forth in the bill of complaint herein are not true.

Fifth. That it appears affirmatively from the answer of the defendants that the complainant has legally established and is entitled to collect a water rental of \$7.00 per acre per annum for the irrigation of the lands of the defendants and each of them respectively, and that it is entitled to collect said amount as alleged in the bill of complaint herein unless said rate is unreasonable; and it is further shown and appears from said answer that the defendants have no standing in this court to contest the reasonableness of said rates, but that their remedy, if any they have, is to apply to the board of supervisors of the county in which their said land is situated to fix and establish said rates.

Sixth. That the said answer shows on its face that the complainant is legally and equitably entitled to charge and collect the rate of \$7.00 per acre for the irrigation of the lands of the defendants, and that said rate is reasonable and just.

In all which particulars the complainant is advised that the answer of the defendants is altogether evasive, imperfect, insufficient, and impertinent.

Wherefore said complainant doth except thereto and prays that the defendants may be compelled to amend the same and put in a full and sufficient answer to the complainant's bill.

WORKS & WORKS,

*Solicitors for Complainant.*

That on the 16th day of November, 1897, the complainant, Charles D. Lanning, receiver, served and filed the following notice of motion :

“(Title of Court and Cause)

“The defendants are hereby notified that on Monday, the 22nd day of November, 1897, the complainant, Charles D. Lanning, receiver of the San Diego Land & Town Company, will move the court

for the discharge of the said Charles D. Lanning as such receiver and will, at the same time and place, move the court that the San Diego Land & Town Company of Maine be substituted as complainant in said suit in lieu of the complainant above named.

Said motion will be made at the court-room of said court, in the post-office building, in the city of Los Angeles, State of California, and will be made on the ground that all of the property mentioned and described in the bill of complaint filed herein has, under and by virtue of a decree of this court, been sold by said receiver to the said San Diego Land & Town Company of Maine and the proceeds of such sale received by said receiver, and that said receivership has been fully settled and closed, and that the said San Diego Land & Town Company of Maine has acquired all of the right, title, and interest of the said San Diego Land & Town Company in and to all of said property and is now the only party interested in the further litigation of the questions involved in this suit.

Said motion will be based upon the pleadings, minutes, and proceedings of the court in said cause.

WORKS & WORKS,  
*Solicitors for Complainant.*"

94 That on the 22nd day of November, 1897, said court made  
and entered the following order, to wit:

“CHARLES D. LANNING, Receiver, Complainant, }  
*vs.* } No. 671.  
H. C. OSBORNE ET AL., Defendants.

"This cause coming on for hearing at this time on a motion of complainant for substitution of plaintiff, J. D. Works, Esq., of counsel, appearing as solicitor for complainant; John S. Chapmen, Esq., of counsel, appearing as solicitor for defendants, is called, and said motion having been argued by respective counsel, it is ordered that the same be submitted to the court for its consideration and decision. It is further ordered that the exceptions to the answer hereinbefore submitted in this case be now sustained; to which ruling of the court defendants, by John S. Chapmen, Esq., their counsel, except."

That on the 6th day of December, 1897, the court made and entered in said cause the following order:

“CHARLES D. LANNING, Receiver of the San Diego Land  
 & Town Company, a Corporation, Complainant,  
*vs.*  
 H. C. OSBORN ET AL., Defendants.

} No. 671.

“This cause having heretofore been submitted to the court for its consideration and decision upon the motion of the complainant, Charles D. Lanning, receiver of the San Diego Land and Town Company, for the discharge of the said Charles D. Lanning, as such receiver, and that the San Diego Land & Town Company of  
95 Maine be substituted as complainant in said suit in lieu of the complainant above named, and the court having duly

considered the same and being fully advised in the premises, it is now, on the 6th day of December, 1897, ordered that said motion be, and the same hereby is, granted, and the San Diego Land & Town Company of Maine be, and hereby is, substituted as complainant in said suit in lieu of the complainant above named; to which ruling of the court defendants, by their counsel, J. S. Chapman, ask and are allowed an exception."

That on the 6th day of December, 1897, the San Diego Land & Town Company of Maine served upon defendants and filed the following notice of motion:

"THE SAN DIEGO LAND & TOWN COMPANY OF MAINE, Com-	plainant,	}
	vs.	
	H. C. OSBORN ET AL., Defendants.	

"The defendants in the above-entitled suit are hereby notified that on Monday, the 20th day of December, 1897, at 10.30 o'clock a. m., or as soon thereafter as counsel can be heard, the complainant will, at the court-room of said court, in the Federal building, in the city of Los Angeles, State of California, move the court for an order that the bill in said suit be taken *pro confesso*, and that decree of the court be entered accordingly.

Said motion will be made on the minutes and proceedings of the court and the papers on file in said suit, and will be made upon the ground that exceptions have been sustained to the answer of the defendants, and that they have failed to file an amended answer within the time prescribed by law and the rules of the court.

WORKS & WORKS,  
*Solicitors for Complainant.*"

96 That on Monday, the 20th day of December, 1897, said circuit court made and entered its order as follows:

"That SAN DIEGO LAND & TOWN COMPANY OF MAINE,	Complainant,	}	No. 671.
	vs.		
	H. C. OSBORN ET AL., Defendants.		

"This cause coming on this day to be heard, on the motion of complainant for an order that the bill in said suit be taken *pro confesso*, and that a decree of the court be entered accordingly—J. D. Works, Esq., appears as counsel for complainant and A. Haines, Esq., appears as counsel for defendants—now, on motion of defendants' counsel and with the consent of complainant's counsel, it is ordered that the cause be, and the same hereby is, continued two (2) weeks for said hearing."

That on the 27th day of December, 1897, the defendants served upon the counsel for Charles D. Lanning, receiver, complainant, the following notice of motion, to wit:

“(Title of Court)

“CHARLES D. LANNING, Receiver, Complainant,  
*vs.*  
 H. C. OSBORN ET AL., Defendants.

"To Messrs. Works & Lee, attorneys for complainant :

Take notice that the defendants will on Monday, the 3rd day of January, 1898, move the court at the opening of the court on that day, or as soon thereafter as counsel can be heard for that purpose, to dismiss the suit upon the following grounds, to wit:

97 First. That the receiver has been discharged and has no further interest in the matter.

Second. That the property has been sold under foreclosure and passed into the hands of another corporation, and the receiver no longer has any charge over it.

Third. That the San Diego Land & Town Company of Maine is not the successor of Lanning, the receiver, and has no interest in the matters alleged in the bill nor any right to prosecute the said action.

Fourth. That neither the original corporation nor the receiver nor any creditor of the said corporation has any interest in the subject-matter of this action, and that since the commencement of said action the board of supervisors of the county of San Diego have passed an order or resolution fixing the rates to be charged by the San Diego Land & Town Company of Maine for furnishing water to the defendants and to all others.

That said motion will be made upon the records and files in the case and the minutes of the court and upon the affidavit of J. S. Chapman; a copy of which is hereto annexed.

C. H. RIPPEY,  
HAINES & WARD, &  
J. S. CHAPMAN,

*Attorneys for said Defendants.*

Dated December 27th, 1897."

"(Title of Court and Cause.)

" STATE OF CALIFORNIA, } 88 :  
County of Los Angeles, }

J. S. Chapman, being duly sworn, deposes and says that he is one of the attorneys for the defendants in the above-entitled action, and that he is informed and believes and therefore states that since the commencement of this action the board of supervisors of the county of San Diego, State of California, have duly passed an ordinance fixing the rates to be charged for the use of water by the San Diego Land & Town Company of Maine, the successor of the San Diego Land & Town Company of Kansas, as will more fully appear by the certified copy of the ordinance hereto attached and made a part of this affidavit.

And further deponent saith not.

J. S. CHAPMAN.



Subscribed and sworn to before me this 27th day of December, 1897.

[SEAL.]

ALFRED C. DEZENDORF,  
Notary Public in and for the County of  
Los Angeles, State of California."

(Certified copy of ordinance annexed.)

That on the 3rd day of January, 1898, the court made and entered its order in words and figures following, to wit:

<p>"THE SAN DIEGO LAND &amp; TOWN COMPANY OF MAINE, Complainant, vs. H. C. OSBORN ET AL., Defendants.</p>	}	No. 671.
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"This cause coming on this day to be heard on the motion of the defendants that the court dismiss the suit, and also to be heard upon the motion of complainant for an order that the bill in said suit be taken *pro confesso*, and that a decree of the court be entered accordingly, John D. Works, Esq., appearing as counsel for complainant, and J. S. Chapman, Esq., and A. Haines, Esq., appearing as counsel for defendants, and said motions having been presented to the court by counsel, it is now ordered that said motion to dismiss be, and the same hereby is, denied; and the defendants not having answered the bill, it is further ordered that said bill be, and the same hereby is, taken *pro confesso* as against all of said defendants, and that a decree of this court be entered in accordance with the opinions  
99 of the court on file in this suit; to which ruling of the court defendants, by their counsel, note and allowed an exception."

That afterwards, on the 12th day of February, 1898, without proofs, the court made and caused to be entered in said cause, greatly to the prejudice and injury of your orators, its final decree; which said decree is entered at large upon the records of this court and is in words and figures as follows, to wit:

"In the Circuit Court of the United States, Ninth Circuit, Southern District of California.

2 SAN DIEGO LAND & TOWN COMPANY OF MAINE, Substituted as Complainant in the Place of Charles D. Lanning, Receiver of the San Diego Land & Town Company, Complainant,

vs.

H. C. OSBORNE, WILLIAM KNAPP, A. BARBER, MRS. E. L. WILLIAMS, T. M. Eaton, J. M. Davidson, A. J. Smith, A. Hammond, John T. Judkins, Henry Gulick, Sr.; H. S. Whittaker, A. Barnett, J. N. Woodward, A. B. Stephens, John Nickson, J. H. Fawcett, Payne Brown, W. E. Montgomery, Monroe Johnson, A. Haines, M. L. Ward, Ella B. Ward, A. Keene, Fred Keene, E. K. Earle, H. F. Earle, Thomas Walker, A. G. White, W. J. Brower, P. B. Smith, F. B. Merriam, H. Hyatt, H. Stegeman, R. S. Harris, A. A. Gooden, G. A. Dukes, C. H. Rippey, Virginia Rippey, C. C. Jobes, J. L. Griffin, Tallie Spencea Sullivan, W. C. Kimball, J. C. Frisbie, S.



- W. Morgan, George Hannahs, Charles O. Brown, F. B. Webb, John Haberfellner, W. S. Wilkins, S. W. Hines, Chula Vista School District, S. Healey, M. E. Phinney, D. L. Murdock, Dan. P. Stetzelberger, R. P. Middlebrook, Anson Titus, W. A. Henry, J. W. Preston, W. E. Ballinger, J. H. Blakeslee, J. Morley, C. F. Wiggins, S. F. Dickinson, O. C. Noyes, J. E. Clouse, Peter Morse, E. W. Dyer, Parsons Shaw, A. C. Crockett, E. E. Flanders, Elisla M. Gavin, Stephen Sheffield, C. A. Whittemore, F. Gardner, Charles Mohuikie, Carl Reimisch, David K. Horton, George Henninger, J. M. Cook, O. H. P. Forker, I. N. Lamson, George D. Hayes, A. A. Groat, J. H. Bowen, R. H. Longshare, W. O. Bowen, J. G. Shaw, Julian Field, C. E. Foss, Otto Sollner, A. B. Story, L. E. Allen, C. F. Chadwick, A. R. Schulenburg, James W. Jackson, John H. Ferry, Frank W. Hedges, A. V. Bills, C. L. Barber, A. J. Stokes, T. E. Walker, A. J. Grainger, E. P. Hammack, Wah Hong, Edward Gulick and William Gulick and Henry Gulick, Partners, Doing Business under the Firm Name of Gulick Brothers; John J. Jones, Wm. D. Webber, W. F. Stearns, H. H. Rice, W. J. Henderson, P. W. Morse, O. Darling, Walter Price, S. J. Bradt, R. W. Vaughan, F. A. Moses, E. J. Elliott, M. E. Jennings Verity, J. E. Stephens, R. G. Wallace, George H. Hancock, Frank Howe, I. N. Morse, Emil O. Hoeh, C. S. Johnson, C. W. Ellsworth, Wm. Steckle, J. H. Clough, George L. Henderson, M. Cox, John Johnson, A. T. Burr, A. M. Jameson, H. E. Klammer, J. H. Dean, P. S. Leisenring, J. M. Johnson, Ah Quinn, Ah Lit, J. M. Ballou, S. H. Dale, George M. Tutton, E. P. Lounsbury, George W. De Tar, D. D. Foss, Austin Carey, George J. Jecock, D. S. McBean, Quincy A. Petts, Morton Penfield, J. A. Thomas, J. O. Reinhart, William Doyle, F. O. Reinhart, H. I. Atwater, E. H. Woods, N. H. Downs, Edwin S. Belcher, W. G. Terrii, T. G. Ellis, W. M. Carr, D. F. Garrettson and Elisabeth A. Garrettson, Executors of the Estate of G. A. Garrettson, Deceased; George M. Darnell, Flora B. Arndt, J. W. Stearns, P. W. Beck, M. G. Miller, J. F. Morrill, Fred W. Pearson, Sunnyside School District, N. J. Pillsbury, Julia Latta, Mary R. Klammer, Thomas Lindsay, E. P. Carr, I. M. Howe and H. B. Howe, Partners, Doing Business under the Firm Name of Howe Brothers; Arthur Ryan and Michael Mack, Partners, Doing Business under the Firm Name of Ryan and Mack; F. E. Leslie and H. P. Whitney, Partners, Doing Business under the Firm Name of Leslie & Whitney; James H. Forbes, J. A. Pinkerton, S. D. Murdock, W. Weitkamp, John L. Davis, George H. Eaton, George Rippe, J. H. Greife, F. W. Reid, R. S. Harris, Sweetwater School District, L. W. Goff, George Dashibaugh, William Campbell, Henry Walker, C. C. Hughes, Frank A. Kimball, Henry Haberfellner, F. Mederle, L. C. Wright, Cyrus Johnson, A. W. Howard, Laura F. Meyer, George E. McMurry, F. H. Downs, N. W. Downs, I. P. Dana, Defendants.
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It appearing to the court that on the 5th day of May, 1896, this suit was dismissed as to the defendants I. P. Dana, F. E. Lester,

H. P. Whitney, partners, doing business under the firm name of Lester & Whitney; H. Copeland, George O. Shattuck, J. S. Nickerson, F. A. Moses, John F. Hogan, Charles O. Brown, Fannie Grant, W. D. Bowen, C. W. Ellsworth, William Campbell, Walter Price, J. H. Bowen, William Steckel, H. H. Rice, and Sweetwater Fruit Company, and the exceptions of the complainant to the last amended and further answer of the other defendants, filed herein September 13, 1897, having been by the court sustained, and the said defendants having failed to amend their said answer or to plead further, and the complainant, San Diego Land & Town Company of Maine, having been ordered by this court, made and entered on the 6th day of December, 1897, substituted as complainant in place of the original complainant, Charles D. Lanning, receiver of the San Diego Land & Town Company of Kansas, and an order having been duly entered by this court on the 3rd day of January, 1898, that complainant's bill of complaint herein be taken *pro confesso*, for want of an answer, against all of the defendants except those as to whom the action was dismissed as aforesaid, and thirty days having expired since said last-mentioned order was made:

Now, therefore, as to those defendants against whom this action was dismissed as aforesaid the court finds that said defendants are entitled to a decree of dismissal and for their costs.

The court further finds as against all of the other defendants that the allegations contained in the bill of complaint herein are true, and that the complainant, San Diego Land & Town Company of Maine, is entitled to a final decree against said defendants, in conformity to the opinion of the court filed herein September 14, 1896, and for the costs and expenses laid out and expended herein by said complainant and by the original complainant, Charles D. Lanning, receiver of the San Diego Land & Town Company of Kansas.

It is therefore considered and decreed by the court that this suit be, and the same is, dismissed as to the defendants as to whom the same was dismissed by the complainant as aforesaid, and that they recover of the complainant their costs.

It is further considered and decreed by the court that the defendants herein other than those defendants as to whom this suit has been dismissed as aforesaid be, and they are hereby, perpetually enjoined from prosecuting in the State courts or elsewhere separate actions against the complainant, San Diego Land & Town Company of Maine, to prevent said complainant from collecting or enforcing the collection of the rate of \$7.00 per acre per annum for the irrigation of the lands of said defendants and each of them, fixed and established by the San Diego Land & Town Company and by Charles D. Lanning, receiver, as in the said bill set forth, until the fixing and establishing of such rates by the board of supervisors of the county of San Diego, State of California, or the re-establishment thereof in accordance with law.

It is further considered and decreed by the court that the said San Diego Land & Town Company and Charles D. Lanning, receiver, had the right to increase the amount of the water rentals of said

103 company for water furnished to the lands of said defendants from \$3.50 per acre per annum to the sum of \$7.00 per acre per annum for such irrigation, and that the said defendants be, and they are and each of them is hereby, required to pay to the complainant said rate of \$7.00 per acre per annum for water furnished their lands, as set forth in the bill of complaint herein, from and after the first day of January, 1896, until the fixing and establishing of such rates by the board of supervisors of San Diego county, California, or the re-establishment thereof in accordance with law, as a condition upon which water shall be furnished them by the complainant, and that upon failure of said defendants or any of them to pay said rates the complainant, San Diego Land & Town Company of Maine, be, and it is hereby, authorized to shut off the supply of water to such or any of said defendants who shall fail for five days to make such payment: Provided that the furnishing of water to the defendants for other purposes be not thereby interfered with.

It is further considered and decreed by the court that the complainant recover of said defendants the costs and expenses laid out and expended in this suit by the complainant, San Diego Land & Town Company of Maine, and by the original complainant, Charles D. Lanning, receiver of the San Diego Land & Town Company."

That your orators have paid the costs adjudged against them by said decree in the sum of \$107.15, and have in all things obeyed and performed said decree.

104 And for errors apparent in the orders and decree aforesaid your orators and each of them, among other things, show:

*Errors in Sustaining Exceptions to Answer Numbered First, Second, Third, Fourth, Fifth, Sixth.*

First. That the order made in said cause under date November 22, 1897, sustaining the exceptions and any of the exceptions on part of complainant filed herein on Sept. 22, 1897, to the further answer and the supplemental answer of your orators, defendants in said cause, filed Sept. 13, 1897 (after the expunging of the entire former answers of defendants by the orders of the court sustaining complainant's exceptions thereto for irrelevancy and impertinence), is erroneous in the following respects, to wit:

Said order erroneously treated and considered said exceptions filed September 22, 1897, as raising for decision the merits of the defenses set forth in said answer, and said order expunged said answer from the record and deprived all said defendants, including your orators, of their right to have said answer considered upon the final hearing of said cause, whereas the merits of said defenses were open to decision on the face thereof only upon the setting down of the cause for hearing upon bill and answer, and that your orators were by said order deprived of their rights to have the merits of said defenses on their face regularly determined upon the setting of the cause for hearing on bill and answer, or upon issues raised and proofs made.

*Errors in Sustaining Exception Numbered First to the Further Answer and Supplemental Answer.*

Second. That said order of November 22, 1897, in sustaining of the exceptions filed herein Sept. 22, 1897, to the answer of your orators, filed Sept. 13, 1897, that numbered "first," for alleged immateriality, irrelevancy, and impertinency, is error apparent, 105 in that the expunging thereby of the parts of the answer in said first exception set forth prevented all the defendants from showing upon the record of said cause and from establishing by proofs or otherwise and from having any benefit of the matters and defenses set forth in all such parts of their answer, although neither of the matters excepted to nor any part or parts thereof are immaterial, irrelevant, or impertinent.

And that said order is error apparent in sustaining each subdivision of said first exception and in expunging the portion of the answer in each such subdivision set forth, to wit, subdivision 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44.

That it was error apparent among other errors to consider and adjudge by said order upon said first exception the matters following, to wit:

That all of the allegations of said answer setting forth that the waters and water system of the San Diego Land & Town Company of Kansas were its private property were immaterial, irrelevant, and impertinent.

And that all the allegations of said answer setting forth that said corporation, by the contracts, agreements, conveyances, transfers, acts, representations, classifications, and admissions made by it and made under the circumstances, all as in the answer set forth, did grant to and vest in your orators and did recognize and acknowledge their water rights and freehold easements of the flow and use of water from said water system as appurtenant to lands owned respectively by your orators and as constituting corresponding freehold servitudes on said company's water system were immaterial, irrelevant, and impertinent, and that they were so in virtue of the constitution and laws of the State of California.

And that all the allegations of said answer setting forth 106 that all claims and demands of said company for the price or compensation for said water rights, easements, and servitudes had been paid or otherwise satisfied were immaterial, irrelevant, and impertinent, and that all such freehold water rights, easements, and servitudes were void and in conflict with the constitution and laws of said State.

And that all the allegations of said answer setting forth the representations, agreements, and contracts, made by said corporation of Kansas to and with each of your orators, fixing the water rate for irrigation of their lands under their respective water rights, easements, and servitudes at the rate of \$3.50 per acre per annum

were irrelevant, immaterial, and impertinent, and that any such contracts or agreements are in conflict with the constitution and laws of the State of California and void, and that all such allegations of the contractual fixing of water rates in connection with all such allegations of water rights, easements, and servitudes were altogether impertinent in defense to the demand of said corporation and its said receiver to increase without the consent of your orators the rate of \$3.50 per acre per annum for irrigation of their lands to \$7 per acre per annum.

And that all the allegations of said answer setting forth that the rate of \$3.50 per acre per annum for irrigation of the lands of your orators was the only rate which had ever been actually established and collected by said corporation were immaterial, irrelevant, and impertinent.

And that the allegations that your orators were induced to purchase, improve, and settle upon their respective tracts of land in reliance upon said established rate of \$3.50 per acre were immaterial, irrelevant, and impertinent.

And that the allegations that your orators had for more than five years held and enjoyed the use of said water upon their land  
 107 for irrigation purposes at said annual rate of \$3.50 per acre, and that the right to have and enjoy the use of said water at said rate became vested in your orators respectively by operation of the statute of limitations of the State of California, were immaterial, irrelevant, and impertinent.

Amended by  
 order of court  
 December 5th,  
 1898. Wm. M.  
 Van Dyke, clerk.

And that the allegations that your orators were induced to purchase, improve, and settle upon their respective tracts of land in reliance upon said established rate of \$3.50 per acre were immaterial, irrelevant, and impertinent.

And that the allegations that your orators had for more than five years held and enjoyed the use of said water upon their land for irrigation purposes at said annual rate of \$3.50 per acre, and that the right to have and enjoy the use of said water at said rate became vested in your orators respectively by operation of the statute of limitations of the State of California, were immaterial, irrelevant, and impertinent.

And that all the allegations of said answer setting forth the total irrigation capacity of said water system and the proportion of the same not used and all the other facts and circumstances pertaining to the reasonableness of said increase of rate set forth in said answer were irrelevant, immaterial, and impertinent to be answered to such demanded increase.

And that the denial that said corporation was entitled to demand from your orators water rentals beyond \$3.50 per acre per annum to apply upon the demanded net income of six per cent. per annum was immaterial, irrelevant, and impertinent.

And that the denial that the compensation to said corporation for either of your orators' respective water rights, easements, and servitudes was or still is subject to regulation by any board of supervisors of said State, as provided in said act of 1885, was irrelevant, immaterial, and impertinent.

And that the denial that at the said rate of \$3.50 per acre for irrigation, together with rates for domestic use, if water should be demanded and used upon the whole of the land which the  
 108 said system is able to supply with water, said company would not be able to pay its operating expenses and maintain from such rentals its plant and system, and the denial that by reason of said established rate said company was losing money, and the denial that the plant of said company is going to decay, without sufficient resources from said rate for replacing the same, and the denial that said company at said rate of \$3.50 will be compelled to furnish water to consumers at any loss, or that, if said rate of \$3.50 is maintained, said system will be lost, are immaterial, irrelevant, and impertinent.

And that the allegation of the requirement, as a condition to the refraining by said company and its receiver from shutting off the supply of water to each of your orators under their respective water rights and easements, that your orators should subscribe and execute the agreement, designated "Application for water," set forth in the complaint was immaterial, irrelevant, and impertinent.

And that the denial that any increase of the said rate of \$3.50 is at all necessary to enable said corporation or its receiver to maintain and operate said water plant and pay the expenses of the maintenance and operation thereof is irrelevant, immaterial, and impertinent.

That the allegations relating to the amount in controversy as to each of your orators and as affecting the jurisdiction are irrelevant, immaterial, and impertinent.

And that the allegations of the answer which rely upon and invoke the application of the provisions of section one of article XIV and of article V of the amendments to the Constitution of the United States, and which rely upon and invoke the application of section one of article I and of section nine of article XX of the constitution of California, and which rely upon and invoke section

11½ of the amendment of the act of March 12, 1885, of the  
 109 State of California, set forth in said answer, and each of them, are immaterial, irrelevant, and impertinent.

#### *Error in Sustaining the Second Exception.*

Third. That there is error apparent in the said order of November 22, 1897, in that it sustains the second of the exceptions filed herein September 22, 1897, to the answer filed Sept. 13, 1897, inas-

much as the bill of complaint alleges that each of your orators, defendants to said bill, are owners of their water rights and alleges no distinction or discrimination between such rights, whether acquired by purchase or otherwise, and calls for no answer as to which became such owners by purchase and which became owners otherwise, and that the answer is not evasive or uncertain, as alleged, but shows that such water rights, easements, and servitudes, however acquired, are each in freehold, and that each has been created by said corporation of Kansas, and that compensation for each has been paid, or that satisfaction has been otherwise made to said corporation for the same.

*Error in Sustaining Third Exception.*

Fourth. That there is error apparent in the order of November 22, 1897, in so far as it sustains the third of the exceptions filed herein September 22, 1897, to the answer filed Sept. 13, 1897, in that said exception assumes, against the fact, that said answer admits that the just cost of said water system to said corporation of Kansas was \$750,000, and in that said exception assumes, against the fact, that it affirmatively appears by the said answer that the annual rental of \$7 per acre per annum will not and cannot realize to said company the sum of 6 per cent. net income per annum, and in that said exception assumes and said order sustains the assumption that the law of the State of California allows said company, as against your orators, the defendants to said bill, as a reasonable return on their investment the sum of not less than 6 nor more than 110 18 per cent. net on the value of said plant and system without regard to the water rights, easements, and servitudes owned by your orators, as set forth in their said answer, and without regard to the agreements of said company with your orators as to the annual rate of \$3.50 per acre per annum, as set forth in said answer.

*Error in Sustaining Fourth Exception.*

Fifth. That there is error apparent in said order of November 22, 1897, in so far as it sustains the exception numbered fourth of those filed September 22, 1897, to the answer filed Sept. 13, 1897, in that said exception points out no matter in the bill of complaint which is not well and sufficiently answered or respecting which the denials or averments of the answer are evasive, imperfect, or insufficient; wherefore said exception is insufficient in form to point out to or inform the defendants to said bill of any insufficiency in said answer, and on that ground ought not to have been sustained.

And that there is error apparent in said order, in that none of the denials, admissions, or averments in said answer are evasive or imperfect or insufficient.



*Error in Sustaining the Fifth Exception.*

Sixth. That there is error apparent in the order of November 22, 1897, sustaining the exception numbered fifth of those filed September 22, 1897, to the answer filed September 13, 1897, in that said order assumes and decides that the question whether it appears from the answer of the defendants that the complainant receiver has legally established and is entitled to collect a water rental of \$7.00 per acre per annum for the irrigation of the lands of the defendants and each of them respectively is properly triable upon exception to the answer.

And that there is error apparent in said order, in that said exception assumes and said order sustaining it decides that it appears affirmatively or in anywise from said answer that said corporation of Kansas or said receiver complainant had or has  
111 legally established and is entitled to collect a water rental of \$7.00 per acre per annum for the irrigation of the lands of the defendants or any of them.

And that there is further error apparent in said order, in that it sustained the part of said exception charging that the defendants (your orators) had no standing in said court and cause to contest the reasonableness of the rate of \$7.00 per acre per annum demanded by complainant, but that their remedy, if any they have, is to apply to the board of supervisors of the county in which their said land is situated to fix and establish the rates to be paid for such water.

That the order sustaining said exception is error apparent, in that it so construed and applied to this cause the statute of California approved March 12, 1885, referred to in the bill of complaint, as that said statute operated and operates to deprive each of your orators of his and her and its water rights, easements, and servitudes and of the right to enjoy the same at the rate of \$3.50, actually established and collected by said corporation and as established by the contracts, all as in said answer set forth and all without due process of law, and to deprive your orators of their liberty to contract for their said water rights, easements, and servitudes without due process of law, and to deny to each of your orators the equal protection of the laws, all in contravention of section one, article XIV, of the amendments to the Constitution of the United States, and article five of the amendments to the Constitution of the United States, and that said order is error apparent, in that it so construes said statute as that the same conflicts with article one, section I, of the Constitution of the State of California, and with section nine (9) of article 20 of the Constitution of the State of California.

*Error in Sustaining Sixth Exception.*

112 Seventh. That there is error apparent in the said order of November 22, 1897, in so far as it sustains the exception numbered sixth of the exception filed September 22, 1897, for that it was not competent to raise upon exception to the answer the ques-



tion whether it shows on its face that complainant is legally or equitably entitled to charge and collect the rate of \$7.00 per acre for the irrigation of the lands of your orators or whether said raised rate is reasonable and just.

And for that the facts set forth in said answer do not sustain the charge set forth in said exception and sustained by said order.

Eighth. That there is error apparent in the aforesaid order made and entered on the 6th day of December, 1897, substituting the San Diego Land & Town Company of Maine as complainant in place of the original complainant, Charles D. Lanning, receiver of the San Diego Land & Town Company of Kansas, in that said order was irregular and not in accordance with the practice prescribed by rule 57 of rules of practice for the court of equity of the United States, and that thereby your orators, as defendants to said bill, were denied opportunity to demur, plead, or answer to any supplemental bill setting forth any alleged interest in said cause of the San Diego Land & Town Company of Maine.

Ninth. That there is error apparent in the aforesaid order entered in said cause on the 3rd day of January, 1898, that complainant's bill of complaint be taken *pro confesso* for want of an answer against your orators, defendants to said bill, in this:

That, notwithstanding the sustaining of the exceptions for immateriality, irrelevancy, and impertinence to all those parts of said answer set forth in the exception numbered first and the expunging of the same, the admissions, denials, and averments in the answer not excepted to raised material issues in said cause, and that the said order is not warranted by the course of practice in equity or by any equity rule whereby your orators were deprived of a hearing upon the merits of said cause.

#### *Errors Apparent in Decree.*

Tenth. That no decree in favor of the complainant ought to have been made or granted on the bill of complaint, for that the decree is not warranted by the allegations of the bill of complaint.

Eleventh. That the decree in said cause is, upon the allegations of the bill of complaint, against the statute law of the State of California entitled "An act to regulate and control the sale, rental, and distribution of appropriated water in this," &c., &c., as approved March 12, 1885, and as amended by the act of the law of said State approved March 2, 1897, in this—

That it appears on the face of said bill that the San Diego Land & Town Company of Kansas at the time when it commenced to furnish water to consumers, to wit, in the year 1887, established the annual rate of \$3.50 per acre for irrigation, and that said corporation and C. D. Lanning, as its receiver, from said date continually maintained and collected said rate and no more from all consumers and at no time collected any other rate, and that said rate at the time of filing said bill was and at the date of said decree remained the only actual rate established and collected by said corporation or its said receiver, and that it further appears by the said bill that

the board of supervisors of the county of San Diego mentioned in the complaint had not fixed or established rates of yearly rental at which said San Diego Land & Town Company should furnish water to consumers.

And that by the said statute law it was and is provided that until such rates should be so established by such board of supervisors the actual rates established and collected by every such corporation should be deemed and accepted as the legally  
114 established rate thereof, and that said statute law further provided and provides that every such corporation furnishing water to lands, as did said Kansas corporation to the defendants (your orators), as alleged in said bill, shall furnish such waters at rates not exceeding the established rates as fixed and established by such corporation as provided in said act, and that said statute provided and provides that every such company shall be obliged to furnish such water at the established rates regulated and fixed therefor as in said act provided to the extent of the actual supply of the waters of such corporation.

That by said decree your orators, defendants in said action, are deprived of the use of water from said system for irrigation at the rate actually established and collected by the San Diego Land & Town Company of Kansas at the time when your orators respectively became owners of their water rights and at the only rates at any time actually established and collected by said corporation or its receiver prior to and since said vesting of the said water rights, to wit, at the rate of \$3.50 per acre per annum.

Twelfth. That the decree in said cause, upon the allegations of the said bill, is against the rights of your orators, named as defendants to said bill, in that said bill of complaint shows upon its face that your orators are the owners respectively of tracts of land under the water system of said San Diego Land & Town Company of Kansas, and that your orators own and hold small tracts of land of only a few acres each, and said bill further shows that each of your orators respectively had become and was the owner of a water right to such part of the water appropriated and stored by said company as is necessary to irrigate his tract of land, subject to such yearly rental as said company was entitled to charge.

That it further appears on the face of said bill that the  
115 annual expense of operating and keeping in repair the reservoir and water system of said company and of furnishing all consumers under said system is, exclusive of interest on the bonds of said company, the sum of \$12,034.99.

That it further appears from said bill that the annual income from water rates collected under said system was \$25,715.00.

And that the rate actually established and collected by said company for furnishing water for irrigation of the lands of your orators and his codefendants named in said bill under their said water rights was \$3.50 per acre per annum, and that the proceeds of the same enters into the aggregate annual income of said water system.

And notwithstanding the said bill shows that said company and the said C. D. Lanning, the receiver of said company, the complain-

ant thereon, gave notice to your orators, defendants to said bill, that from and after January 1, 1896, they would demand a rental of \$7.00 per acre per annum for water for irrigation, being twice the rate up to that time actually established and collected by said company or its receiver for furnishing your orators with such water, and notwithstanding that said bill further shows that because your orators and each of them refused to pay said rate of \$7.00 per acre, and maintained that neither said land & town company nor said C. D. Lanning, as receiver thereof, had any legal right to increase the amount of rental to be paid by them or any of them, and maintained that the rate of \$3.50 established and collected by the said land & town company must be and remain the established rate of rental, the said receiver, in order to enforce the payment of said increased rentals, caused the said water to be shut off from the premises of the defendants and each of them, and did deprive your

116 orators, defendants in said action, of the use and enjoyment of their said water rights upon payment of the rates of \$3.50 per acre per annum actually established and collected by said corporation and collected by said receiver.

Yet that the decree herein erroneously holds, decides, and decrees that said San Diego Land & Town Company of Kansas and Charles D. Lanning, receiver thereof, had the right to increase the amount of the water rentals of said company for water furnished to the lands of said defendants from \$3.50 per acre per annum to the sum of \$7.00 per acre per annum without the consent of any of your orators, and erroneously holds, decides, and decrees that your orators shall be required to pay to the San Diego Land & Town Company of Maine said rate of \$7.00 per acre per annum for water furnished to their lands, as set forth in the said bill of complaint, from and after the first day of January, 1896, until the fixing and establishing of such rates by the board of supervisors of San Diego county, California, or the re-establishment thereof in accordance with law as a condition upon which water should be furnished them from said water system, and erroneously holds, decides, and decrees that the San Diego Land & Town Company of Maine is authorized to shut off the supply of water for irrigation of such lands of any of your orators, the defendants to said bill, who should fail for five days to make such payment of arrears of said increase of water rate.

Whereby your orators, the said defendants, are deprived of all benefit of the ownership of their water rights and, notwithstanding said ownership, are required as a condition to the enjoyment of their said easements to pay to said San Diego Land & Town Company of Maine an annual rate to yield, as appears by said bill, an excess over and above the actual cost of repairs, operation, and management of said water system as and for interest and net revenue upon the whole cost and value of said system and without regard to the servitudes thereon owned by your orators.

117 Thirteenth. That the decree in said cause, on its face and on the face of said bill, enforces legislation of the State of California so construed as that it is in violation of sec. one (1) of

article 14 of the amendments of the Constitution of the United States, in that the legislation so construed and enforced maintains the San Diego Land & Town Company of Kansas and C. D. Lanning, its receiver, in increasing the water rentals for water furnished to the lands of your orators for irrigation of their respective lands from \$3.50 per acre per annum to \$7.00 per acre per annum for such irrigation without the consent of your orators, and in that said legislation, so construed and enforced, justifies and maintains the said Kansas corporation and the said receiver and the San Diego Land & Town Company of Maine in having shut off the flow and use of the water under the water rights owned by the defendants to said bill from the lands of such defendants (your orators), as shown in said bill, for refusal to pay such increase of rate, and in that said legislation, as so construed and enforced, requires your orators to pay the San Diego Land & Town Company of Maine the rate of \$7.00 per acre per annum for water furnished their lands, as set forth in said bill of complaint, from and after January 1, 1896, as the condition upon which water shall be furnished them from said water system, and that the legislation so construed and applied authorizes said last-named corporation to shut off the supply of water to any defendant who shall for five days fail to pay such increase of rate; by which means each of your orators is deprived of his, her, and its property without due process of law, and each is likewise deprived of the equal protection of the laws, and each is likewise without due process of law deprived of his, her, and its liberty to purchase or otherwise acquire the water rights in the complaint referred to, and is deprived of his, her, and its liberty to have the benefit of any acquisition, as in the complaint set forth, of such water rights.

And that said decree, for the same reasons, is in contravention of article V of the amendments to the Constitution of the United States, as being an exercise of the judicial power of the United States, whereby your orators are deprived of their property without due process of law, and whereby they are deprived without due process of law of their liberty to contract and acquire property.

Fourteenth. That there is error apparent in said decree in that it was entered *pro confesso* and without proofs upon the allegations of the bill, and without regard to the unexpunged portions of the answer, and without regard to the portions of the answer expunged on said exceptions filed September 22, 1897, and because it ruled, in conformity to the opinion filed in said action Sept. 14, 1896, adopted by and referred to in said decree, that notwithstanding the alleged fact that \$3.50 per acre per annum was the only rate for water supplied for irrigation that had been established and collected by said San Diego Land & Town Company of Kansas or said Charles D. Lanning, receiver, that said San Diego Land & Town Company and Charles D. Lanning, receiver, had the right to increase the amount of the water rentals of said company for water furnished to the lands of defendants (your orators) from \$3.50 per acre per annum to the sum of \$7.00 per acre per annum for such irrigation, and that the contracts with respect to the rates of \$3.50 per acre per

annum, set forth in the answer, were void, as being in conflict with the constitution and laws of the State of California, and because it rules that your orators had no right to be heard before the court on the question of the reasonableness of the rates of \$7.00 per acre per annum, which the complainant in said action sought to enforce and which said decree enforces, and because it rules that the defendants to said bill of complaint (your orators) were not entitled,

119 upon the question of the rightfulness and lawfulness of the increase of the rate of \$3.50 per acre per annum to \$7.00 per acre per annum, to have any benefit of the ownership of their respective water rights, as set forth in the bill of complaint, or of their freehold easements and servitudes upon said company's water system, as set forth in their answer, nor of the alleged fact that each had paid or made satisfaction to said San Diego Land & Town Company of Kansas for the price demanded by it for his, her, and its such water right, easement, and servitude.

That in point of law, among other things, said errors are, to wit:

1st. Said decree in said respects erroneously construes and applies the provisions of the constitution and laws of the State of California referred to in the bill of complaint and answer.

2nd. That said provisions of the constitution and laws, as so construed and applied by said decree, are in contravention and repugnant to article XIV, sec. 1, of the amendments to the Constitution of the United States, as depriving your orators of their property without due process of law, and as depriving them of their liberty of contract without due process of law.

3rd. That in applying the said provisions of the State constitution and statutes, as so construed by said decree and the opinion referred to therein, the judicial power of the United States was exercised in contravention of article V of the amendments to the Constitution of the United States, and deprived the defendants in said action (your orators) of their property without due process of law and of their liberty of contract without due process of law.

4th. And that the provisions of article XIV of the constitution of the State of California, as so construed, applied, and enforced by said

120 decree, are in violation of the guarantee, by section IV of article IV of the Constitution of the United States, of a republican form of government to said State of California, in that

by said provision of the constitution of said State, as so construed, applied, and enforced, the said State assumes the absolute control of all water appropriated and devoted to sale, rental, and distribution, and the absolute control of all works devoted to the supplying or distribution of such waters; abolishes all capacity for the acquisition of private property rights, easements, or servitudes in such water supply and water works; abolishes all right to unite the ownership of any water supply from any such system with the ownership of lands for irrigation thereof by contract of purchase and payment or otherwise; abolishes all right or capacity for the acquisition of any water right, easement, or servitude in or upon any such water system, by purchase or otherwise, free from the perpetual obligation to pay net revenue, as the said statute now stands, of not less than six nor

more than eighteen per cent. per annum upon the cost or value of such water system, and abolishes all right or capacity to ascertain, fix, and define by contract or convention the rate or compensation to be paid by any consumer for the supplying of any such waters for irrigation of land.

Fifteenth. That there is error apparent in said decree in that said decree is made in favor of the San Diego Land & Town Company of Maine, although said corporation has not become a party to the record in said cause by supplemental bill or otherwise; and what interest, if any, said corporation hath or had in said action does not appear upon the record, nor was any claim on its part to any interest so set forth that the defendants to said bill of complaint, your orators, could in anywise make answer thereunto or plead thereunto.

Sixteenth. That there is error apparent in said decree in that this court was without jurisdiction to entertain said cause or to make any decree upon the merits therein.

121 Seventeenth. That there is error apparent in the said order of the court made on the 3rd day of January, 1898, denying the motion of defendants in said cause to dismiss said suit and in retaining the jurisdiction thereof after the discharge of C. D. Lanning, receiver, the complainant therein, made by order of the court on the 6th day of December, 1897.

Wherefore, as said errors appear on the face of the record and are greatly prejudicial to the complainants and [his]\* <sup>their</sup> rights in the premises, complainants pray that said decree may be reviewed, reversed, and set aside and no further proceedings taken therein; and to that end complainants pray process by subpoena against the San Diego Land & Town Company of Maine, requiring it to appear and answer hereunto and show cause, if it may, why said decree should not be reviewed, reversed, and set aside, and such further orders and decrees be made as to the court may seem just, including the restoration to your orators of the sum of money paid under said decree as aforesaid.

C. H. RIPPEY AND  
HAINES & WARD,  
*Solicitors for Complainants.*

(Endorsed) Circuit court of the United States, ninth circuit, southern district of California. H. C. Osborn *et al.*, complainants, *vs.* San Diego Land & Town Company of Maine, defendants. Bill of review. C. H. Rippey, Haines & Ward, solicitors for complainants. No. 839. U. S. circuit court, southern district of California. H. C. Osborn *et al.* *vs.* San Diego Land & Town Company of Maine. Bill of review. Filed Aug. 12, 1898. Wm. M. Van Dyke, clerk. E. H. Owen, deputy clerk.

[\*Word enclosed in brackets erased in copy.]



122 In the Circuit Court of the United States, Ninth Circuit,  
Southern District of California.

H. C. OSBORNE ET AL., Complainants,

vs.

SAN DIEGO LAND AND TOWN COMPANY OF MAINE, Defendant. }

The defendant moves the court to strike the bill of complaint in the above-entitled suit from the files of said court and to dismiss said suit on the ground that the decree in the suit of San Diego Land and Town Company of Maine *vs.* H. C. Osborne *et al.*, mentioned and set forth in the said bill of complaint and sought to be reviewed herein, has not been performed or complied with, nor has leave been obtained from this court for the complainants to prosecute this suit without performing or complying with said decree.

WORKS & WORKS,

WORKS & LEE,

*Solicitors for Defendant.*

The complainants are hereby notified that on the 5th day of September, 1898, at 10.30 o'clock a. m., or as soon thereafter as counsel can be heard, the defendant, San Diego Land and Town Company of Maine, will, at the court-room of said court, in the Federal building, in the city of Los Angeles, State of California, move said court as set forth in the above and foregoing motion.

Said motion will be made on the grounds set forth therein, and will be based upon the pleadings, minutes, proceedings, and decree in the said case of San Diego Land and Town Company of Maine, substituted instead of Charles D. Lanning, receiver, *vs.* H. C. Osborne *et al.*, bill of complaint in this suit of H. C. Osborne *et al.* *vs.*

123 San Diego Land and Town Company of Maine, and the affidavit of John E. Boal, copy of which is served with this notice.

WORKS & WORKS,

WORKS & LEE,

*Solicitors for Defendant.*

124 In the Circuit Court of the United States, Ninth Circuit,  
Southern District of California.

H. C. OSBORN ET AL., Complainants,

vs.

SAN DIEGO LAND & TOWN COMPANY, Defendant. }

John E. Boal on his oath says that he is the general manager of the defendant in the above-entitled case; that it is adjudged and decreed in the final decree made and entered in the case of San Diego Land & Town Company of Maine *vs.* H. C. Osborn *et al.*, set forth in the bill of complaint herein, as follows:

"That the said defendants be, and they are and each of them is hereby required to pay to the complainant said rate of \$7.00 per acre per annum for water furnished their lands, as set forth in the bill of

complaint herein, from and after the 1st day of January, 1896, until the fixing and establishing of such rates by the board of supervisors of San Diego county, California, or the re-establishing thereof in accordance with law.

That the complainants herein have had and used the waters of the defendant for the irrigation of their lands mentioned and described in the pleadings and proceedings set forth in the bill of complaint herein from the 1st day of January, 1896, until the present time, and have not, as provided in said decree, paid the said rate of \$7.00 per acre per annum therefor, but have paid only the sum of \$3.50 per acre per annum, and have refused and still refuse to pay any greater amount therefor, and have insisted and maintained and do now insist and maintain that said rate of \$7.00 per acre per annum decreed by this court to be the legally established rate is  
125 illegal and void.

That the board of supervisors of the county of San Diego, California, did not fix or establish rates to be charged by the defendant herein until the 16th day of October, 1897, nor have the rates fixed by the said San Diego Land & Town Company of Kansas and the receiver of said company, Charles D. Lanning, been re-established in accordance with law.

JOHN E. BOAL.

Subscribed and sworn to before me this 19th day of August, 1898.

[SEAL.]

JERAULD INGLE,  
*Notary Public in and for the County  
of San Diego, State of Calif.*

(Endorsed:) No. 839. U. S. circuit court, ninth circuit, southern district of California. H. C. Osborne *et al.*, complainants, *vs.* San Diego Land & Town Co. of Maine, defendant. Notice of motion to strike bill from files. Received copy of the within notice Aug. 29, 1898. Haines & Ward, solicitors for complainant. Filed Oct. 27, 1898. Wm. M. Van Dyke, clerk. Works & Works, Wells & Lee, Works & Lee, rooms 420 to 425 Henne building, Los Angeles, Cal., solicitors for defendant.

126 In the Circuit Court of the United States, Ninth Circuit, Southern District of California.

H. C. OSBORN ET AL., Complainants,	}	Affidavit.
<i>vs.</i>		
SAN DIEGO LAND & TOWN COMPANY OF MAINE, De-	}	
fendants.		

COUNTY OF SAN DIEGO, }  
State of California, } ss:

Monroe Johnson, being duly sworn, on his oath says—

That he is one of the complainants in the above-entitled cause and one of the defendants in the suit of The San Diego Land &



Town Company of Maine *v. H. C. Osborn et al.*, numbered 671, mentioned in the bill of complaint and in the motion of defendant herein to strike said bill from the files of the court and dismiss this suit.

That the affidavit of John E. Boal, filed with said motion, does not correctly or truthfully set forth the relief part of the decree in said cause 671, but that said decree is fully and correctly set forth in the bill of complaint herein.

That the water rates to be charged by defendant were fixed and established by the board of supervisors of the county of San Diego, California, on October 16, 1897, as stated in the said affidavit of said Boal, and that the rate so fixed for irrigation was and remains \$3.50 per acre per annum.

That the decree in said cause 671 was entered on March 12, 1898.

That neither this affiant nor, as he is credibly informed and believes, did any other complainant herein and defendant to  
127 said decree use any water from said company's system for irrigation after said decree until nearly June 1, 1898.

That on or about March 26, 1898, these plaintiffs, among other consumers, entered into a written agreement with The San Diego Land & Town Company, defendant herein, for the apportionment of the water in said company's reservoir, which was signed by said company and generally by the plaintiffs, a copy of which, except signatures, is shown by "Exhibit A," hereto annexed.

That the average of said apportionment is about one-half the normal supply, and that by said apportionment the plaintiff conceded to the said company as a consumer some of their claims as prior consumers to a full supply and shared the same with said company and others as later consumers.

That thereupon the larger proportion of these plaintiffs bought and the remainder hired meters of said land & town company for measuring to plaintiffs the water pursuant to said agreement for apportionment.

That said company commenced to deliver water for irrigation to plaintiffs and others about said first of June, 1898, through said meters, under and pursuant to said agreement of apportionment and not otherwise, and has exclusively managed and controlled such delivery according to said apportionment ever since, and has actively aided complainants in taking and using such apportioned waters, and that prior to October 1, 1898, the supply of water from said system for irrigation was exhausted, leaving many of the consumers much short of the supply apportioned to them by said agreement, and by that date irrigation ceased.

That none of the complainants since the entry of said decree has had or used any water of the defendant for the irrigation of any of their lands against the will or without the consent of the company or otherwise than with the consent and concurrence of said company and under said written agreement of apportionment, and that since said decree the said company has at all times up to this date

sent bills to these complainants for the rental of said water  
128 at the rate of \$3.50 per acre per annum, being the full ordinance rate, notwithstanding the short supply and the entire cessation aforesaid, in the form shown by Exhibit "B," hereto annexed, and the complainants have uniformly paid the same and the company has accepted the same.

That none of these complainants have at any time since the signing of said decree used or threatened to use any legal or other compulsion to cause said company to forego the condition prescribed in said decree to its obligation to furnish water to these complainants, but that said company has of its own will and discretion refrained from availing itself of said condition, and has either suspended or waived the same during all the time it has so furnished said water.

That these complainants have not taken, used, or threatened to take or use the waters from said company's system in violation of the condition imposed by said decree, but have, as they believe, in all things obeyed said decree where passive obedience is required by it, and have performed it where it has imposed upon them an unconditional and affirmative duty or command.

That none of these complainants have insisted or maintained or do insist or maintain that said decree shall not be respected and obeyed, or maintain or insist upon any right, except such as they may properly exercise, to have the same reviewed in this court and appellate courts; that neither of them maintain or insist that the rate of \$7.00 per acre per annum decreed by this court to be the legally established rate is illegal and void, as long as said decree remains in force, as is alleged in the affidavit of John E. Boal, but they only by their bill of review herein seek to maintain that there is error apparent in such decree as ground for reviewing and reversing the same.

And affiant for himself and his co complainants avers as ground of appeal to the discretion of the court herein that the complainants, as defendants to the original bill in said cause 671, have presented as a defense the fact that the rate of \$3.50 per acre per annum was

the only rate actually established and collected by the San  
129 Diego Land & Town Company of Kansas and its receiver, and have submitted in said action that under section five of the act of 1885 such rate was equally binding upon said company, its successor in interest, and these complainants; that they conceive that any voluntary payment by them of the rate of \$7 per acre per annum would be to consent to a change of the rate for irrigation from \$3.50 per acre per annum to \$7.00 per acre per annum, which would then become the rate actually established and collected.

That complainants are apprehensive that the voluntary payment of said rate would deprive them of their standing to insist on review or otherwise that \$3.50 was the only rate actually established and collected.

That whether said position is well or ill founded, it is taken in good faith, and plaintiffs appeal to the discretion of the court that they be not required to change their position in the controversy to their possible detriment as a condition to submitting their bill of review herein.

MONROE JOHNSON.

Subscribed in my presence and sworn to before me, by said Monroe Johnson, this 21st day of October, 1898.

M. L. WARD,

*Notary Public in and for the County of  
San Diego, State of California.*

[SEAL.]

Ninth Circuit, Southern District of California, San Diego County.

STATE OF CALIFORNIA, ss:

We, F. B. Merriam, A. C. Crockett, Ira Howe, W. J. Henderson, and P. B. Smith, each being duly sworn, each for himself says that he has heard the foregoing affidavit of Monroe Johnson read; that he is a complainant in said cause, and is informed and knows concerning the facts deposed to by said Johnson, and that the facts stated in the affidavit by said Johnson are true.

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F. B. MERRIAM.  
A. C. CROCKETT.  
IRA HOWE.  
W. J. HENDERSON.  
P. B. SMITH.

Subscribed and sworn to before me and in my presence this 3rd day of November, 1898.

[SEAL.]

M. L. WARD,

*Notary Public in and for San Diego County, Cal.*

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### "EXHIBIT A."

#### *Agreement.*

E. J. Swayne moved that the form of contract to be submitted to the consumers be as follows and preceded by the agreement of the San Diego Land & Town Company as follows:

The undersigned San Diego Land & Town Company of Maine agrees to the following apportionment of the water in accordance with the following apportionment adopted at the mass meeting of consumers at National City March 26th, 1898, and as consumers we agree to accept and take only our quantity as herein apportioned for the time and in the manner herein provided.

The undersigned consumers of water, under the Sweetwater system, in view of the short visible supply impounded in the reservoir of the system for use the present season, hereby mutually agree to the following apportionment of the supply of water now in the reservoir for irrigation among consumers, such apportionment to apply to water now impounded: said apportionment is as follows:

To trees planted in 1897, 45,000 gals. per acre, which am'ts to.....	2,430,000
To trees planted in 1898, 60,000 gals. per acre, which am'ts to.....	14,220,000
To trees planted in 1895, 72,000 gals. per acre, which am'ts to.....	46,584,000

To trees planted in 1894, 90,000 gals. per acre, which am'ts to.....	33,210,000
To trees planted in 1893, 110,000 gals. per acre, which am'ts to.....	61,600,000
To trees planted in 1892, 135,000 gals. per acre, which am'ts to.....	94,095,000
To trees planted in 1891, 170,000 gals. per acre, which am'ts to.....	131,920,000
To trees planted in 1890, 210,000 gals. per acre, which am'ts to.....	275,100,000
	<hr/> 659,159,000

Vegetable gardens, nurseries, alfalfa, ornamental trees, and lawns are to be counted as trees planted and receive the same apportionment of water according to trees planted in 1890.

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*Exhibit A Continued.*

In case of increase of supply the apportionment to be proportionately increased.

We hereby authorize the San Diego Land & Town Company during the season of 1898 to apportion the said water in accordance with the above schedule and apportionment and to distribute to themselves, as consumers of water, the same proportion that would fall to the lot of any other consumer according to the class to which he belongs.

But it is expressly understood that by this agreement we waive no right as consumers or land-owners as between ourselves or the company beyond granting the license to prorate water, as above, for the present season.

We further agree that the following committee of seven, appointed pursuant to the action of the mass meeting of consumers held March 26, 1898, to wit, R. C. Allen, L. E. Allen, L. W. Goff, D. K. Adams, E. Thelan, E. J. Swayne, and A. Haines, be authorized to represent us in all matters connected with the foregoing agreement and to act as arbitrators in the dispute between consumers or with the company growing out of the same.

SAN DIEGO LAND & TOWN COMPANY,

By ———.

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*Exhibit A Continued.*

The undersigned agrees to purchase for himself or co-jointly with others the meter or meters required to measure the water apportioned to his or their lands.

The undersigned herewith applies for meter under ordinance governing same, and agrees that said meter may be available only during the time allotted for delivering the water apportioned.

Name.      No. of meter.      Size.

Name.      No. meter.      Size.

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## EXHIBIT B.

San Diego Land & Town Company, water department.

Checks should be made payable to the order of and all remittances addressed to E. A. Hornbeck, assistant treasurer, National City, Cal.

This company claims that while the amount herein named is in accordance with rates established by board of supervisors, it is inadequate compensation for the water so furnished, and its right and claim to be paid for such water in full at such rates as may be hereafter fixed, pursuant to a decree of court or otherwise, is in no manner waived or compromised by the acceptance of the amount named below.

NATIONAL CITY, CAL., — —, 189—.

Office hours, 8.00 a. m. to 5 p. m.

Saturdays, 8 a. m. to 2 p. m.

DEAR SIR: Your water rent for the — months ending — is now due. Remit by check, if convenient.

Please return this notice.

Register No. —. Amount, —.

Respectfully,

E. A. HORNBECK,  
*Assistant Treasurer.*

Delinquent after the 15th of current month.

135 (Endorsed:) No. 839. In the circuit court of the United States for the ninth circuit, southern district of California. H. C. Osborn *et al.*, plaintiff, *vs.* San Diego Land & Town Company of Maine, defendant. Aff'd't on part of complainants, on motion to remove bill of review from the files. Filed Nov. 7, 1898. Wm. M. Van Dyke, clerk. Haines & Ward, corner Fourth and D streets, San Diego, Cal., solicitors for complainants.

136 At a stated term, to wit, the August term, A. D. 1898, of the circuit court of the United States of America of the ninth judicial circuit in and for the southern district of California, held at the court-room, in the city of Los Angeles, on Monday, the 21st day of November, in the year of our Lord one thousand eight hundred and ninety-eight.

Present: The Honorable Erskine M. Ross, circuit judge.

H. C. OSBORNE ET AL., Complainants,	}	No. 839.
<i>vs.</i>		
SAN DIEGO LAND AND TOWN COMPANY OF MAINE, Defendant.		

This cause having heretofore been submitted to the court for its consideration and decision on defendant's motion to strike the bill of complaint from the files and to dismiss said suit, and the court

having duly considered the same and being fully advised in the premises, it is now, on this 21st day of November, 1898, being a day in the August term, A. D. 1898, of said circuit court of the United States for the southern district of California, ordered that said motion to strike the bill of complaint from the files and to dismiss said suit be, and the said motion hereby is, denied.

137 I, Wm. M. Van Dyke, clerk of the circuit court of the United States for the southern district of California, do hereby certify the foregoing to be a full, true, and correct copy of an original order made and entered by said court November 21st, 1898, in the cause entitled H. C. Osborne *et al.*, complainants, vs. The San Diego Land and Town Company of Maine, defendant, No. 839, and remaining of record therein.

[SEAL.] Attest my hand and the seal of said circuit court this 5th day of December, A. D. 1898.

WM. M. VAN DYKE, *Clerk.*

(Endorsed :) No. 839. U. S. circuit court, ninth circuit, southern district of California. H. C. Osborne *et al.* vs. San Diego Land & Town Company of Maine. Certified copy of order denying motion to strike bill from files. Filed Dec. 5, 1898. Wm. M. Van Dyke, clerk.

138 In the Circuit Court of the United States, Ninth Circuit, Southern District of California.

H. C. OSBORNE ET AL., Complainants,

vs.

SAN DIEGO LAND AND TOWN COMPANY OF MAINE, Defendant. }

The defendant, The San Diego Land and Town Company of Maine, by protestation, not confessing or acknowledging all or any of the matters or things in the amended bill of complaint contained to be true in such manner or form as therein set forth and alleged, presents and files this its demurrer to the said bill, and for cause of demurrer shows :

1. That it appears by the complainants' own showing in said bill that there is and was no error in the proceeding or decision of said court in the case of Charles D. Lanning, receiver of the San Diego Land and Town Company, vs. H. C. Osborne, mentioned and set forth in the bill herein, appearing on the face of the record or otherwise.

2. That it appears from the complainants' own showing in their said bill that they are not nor are any of them entitled to the relief prayed for in their said bill or any relief.

3. That it appears from their own showing by their said bill that there is no such error appearing on the face of the proceedings in the said suit of Lanning, receiver, vs. H. C. Osborne *et al.* or otherwise as can be relieved against by bill of review or a bill in the nature of a bill of review.

139 4. That it appears from the complainants' own showing by their said bill that the remedy of the complainants, if any they have, is by appeal and not by bill of review.

Wherefore, and for divers other good causes of demurrer appearing in said bill, the said defendant, here demurring, demurs thereto, and it prays the judgment of this honorable court whether it should be required to make any answer to the said bill, and it prays to be hence dismissed with its reasonable costs in this behalf sustained.

WORKS & WORKS,  
WORKS & LEE,  
*Solicitors for Defendant.*

We hereby certify that in our opinion the foregoing demurrer is well founded in point of law.

WORKS & WORKS,  
WORKS & LEE,  
*Solicitors for Defendant.*

STATE OF CALIFORNIA, }  
County of San Diego, } ss :

John E. Boal, being duly sworn, says he is the general manager of the defendant in the action mentioned in the foregoing demurrer, and that said demurrer is not interposed for delay.

JOHN E. BOAL.

Subscribed and sworn to before me this 25th day of November, 1898.

[SEAL.]      LEWIS R. WORKS,  
*Notary Public in and for the County of*  
*San Diego, State of California.*

(10c. int. r. stp.)

140 (Endorsed:) No. 839. U. S. circuit court, ninth circuit, southern district of California. H. C. Osborne *et al.*, complainants, *vs.* San Diego Land and Town Company of Maine, defendants. Demurrer to bill. Received copy of the within demurrer Nov. 25th, 1898. Haines & Ward, solicitors for complainant. Filed Nov. 26, 1898. Wm. M. Van Dyke, clerk. Works & Works and Works & Lee, rooms 420 to 425 Henne building, Los Angeles, Cal., solicitors for defendant.

141 At a stated term, to wit, the August term, A. D. 1898, of the circuit court of the United States of America of the ninth judicial circuit in and for the southern district of California, held at the court-room, in the city of Los Angeles, on Monday, the 28th day of November, in the year of our Lord one thousand eight hundred and ninety-eight.

Present: The Honorable Erskine M. Ross, circuit judge.

ceptions to the answer and the ruling thereby that the defendants could not be heard before the court, to contest the reasonableness of the demanded increase of rate to \$7.00 per acre, per annum, erroneous; and was it an infringement of the vested rights of the defendants, for the court, by its decree to enforce such increased rate, while declining to adjudicate whether it was reasonable or just?

#### QUESTIONS OF PRACTICE AND PROCEDURE.

Among the questions of procedure presented are the following, viz:

1. Does the bill of review lie herein?
2. Was it permissible in the equity practice, to question the validity of the affirmative defenses set forth in the answer, by the exception *first*, for imperitency; and was it error in point of procedure for the court to expunge such affirmative defenses from the record by its order sustaining that exception; and to proceed thereafter to render its decree as upon the bill confessed?
3. Was it erroneous for the court to treat the paragraphs entitled "exceptions" numbered *third*, *fifth* and *sixth* (trans. p. 60) as exceptions in any sense known to the equity practice and to sustain them accordingly; or was the effect of the submission made on the claims stated in such *third*, *fifth* and *sixth* paragraphs, a setting down of the cause upon bill and answer; and is it to be treated as disposed of accordingly?



4. Was it error for the court to treat the paragraph numbered "second" (trans. pp. 59, 60), under the entitled "exceptions", an exception in substance or form, in any sense known to the equity practice and to sustain it as such?

5. Is the exception numbered "fourth" (trans. p. 60) sufficient in form or substance, to raise any question of sufficiency of the answer; and was it error for the court to sustain the same?

6. Notwithstanding that the "exception" numbered *first* for impertinency was sustained, and in view of the character of the remaining "exceptions", was it error to render the decree *pro confesso*, in disregard of the issues raised by the unexpunged denials, admissions and averments remaining in the answer?

7. Did the San Diego Land & Town Company of Maine become a party to the record so that it was competent to make a decree in its favor?

8. As to jurisdiction there is presented the question, whether this cause is one of which the Circuit Court had cognizance, either original, or as ancillary to the cause in which the receiver was appointed?

#### **SPECIFICATIONS OF ERROR.**

First. Because the court sustained the first assignment of the demurrer to the said bill of review.

Second. Because the ~~court~~ sustained the second assignment of the demurrer to the said bill of review.

Third. Because the court sustained the third assignment of the demurrer to said bill of review.

Fourth. Because the court sustained the fourth assignment of the demurrer to said bill of review.

Fifth. Because the court, by its ruling upon said demurrer and its decree herein, overruled the first assignment of error set forth in said bill of review.

And thereby erroneously ruled and adjudged that the exceptions filed September 22, 1897, in said original cause, to the further and supplemental answer filed Sept. 13, 1897, raised for decision the merits of the defenses set forth in the answer; that said exceptions were properly sustained, and that said further answer and supplemental answer was properly expunged from the record, and was properly not to be considered on the final hearing of said cause, and that said cause was properly not set down for hearing on bill and answer, or tried on issues joined and proofs made.

Sixth. Because the court, by its ruling upon said demurrer and by its decree herein, overruled the second assignment of error set forth in said bill of review.

And thereby erroneously ruled and adjudged that the court in said original cause properly ruled and held upon the first exception to said answer, among other things erroneous, the following, to-wit:

That all of the allegations of said further answer and supplemental answer setting forth that the waters and water system of the San Diego Land & Town

Company of Kansas were its private property were immaterial, irrelevant, and impertinent.

And that all the allegations of said answer setting forth that said corporation, by the contracts, agreements, conveyances, transfers, acts, representations, classifications, and admissions made by it and made under the circumstances, all as in the answer set forth, did grant to and vest in your orators and did recognize and acknowledge their water rights and freehold easements of the flow and use of water from said water system as appurtenant to lands owned respectively by your orators and as constituting corresponding freehold servitudes on said company's water system were immaterial, irrelevant, and impertinent, and that they were so in virtue of the Constitution and laws of the State of California.

And that all the allegations of said answer setting forth that all claims and demands of said company for the price or compensation for said water rights, easements, and servitudes, had been paid or otherwise satisfied were immaterial, irrelevant, and impertinent, and that all such freehold water rights, easements, and servitudes were void, and in conflict with the Constitution and laws of said State.

And that all the allegations of said answer setting forth the representations, agreements, and contracts, made by said corporation of Kansas to and with each of your orators, fixing the water rate for irrigation of their lands under their respective water rights, ease-

ments, and servitudes at the rate of \$3.50 per acre, per annum, were irrelevant, immaterial, and impertinent,, and that any such contracts or agreements are in conflict with the Constitution and laws of the State of California and void, and that all such allegations of the contractual fixing of water rates in connection with all such allegations of water rights, easements, and servitudes were altogether impertinent in defense to the demand of said corporation and its said Receiver, to increase without the consent of your orators the rate of \$3.50 per acre, per annum, for irrigation of their lands to \$7 per acre, per annum.

And that all the allegations of said answer setting forth that the rate of \$3.50 per acre, per annum, for irrigation of the lands of your appellants was the only rate which had ever been actually established and collected by said corporation were immaterial, irrelevant, and impertinent.

And that the allegations that your appellants were induced to purchase, improve, and settle upon their respective tracts of land in reliance upon said established rate of \$3.50 per acre were immaterial, irrelevant, and impertinent.

And that the allegations that your appellants had for more than five years held and enjoyed the use of said water upon their land for irrigation purposes at said annual rate of \$3.50 per acre, and that the right to have and enjoy the use of said water at said rate became vested in your appellants respectively by opera-

tion of the statute of limitations of the State of California, were immaterial, irrelevant, and impertinent.

And that all the allegations of said answer setting forth the total irrigating capacity of said water system and the proportion of the same not used and all the other facts and circumstances pertaining to the reasonableness of said increase of rate set forth in said answer were irrelevant, immaterial, and impertinent to be answered to such demanded increase.

And that the denial that said corporation was entitled to demand from your appellants water rentals beyond \$3.50 per acre, per annum, to apply upon the demanded net income of six per cent, per annum, was immaterial, irrelevant, and impertinent.

And that the denial that the compensation to said corporation for either of your appellant's respective water rights, easements, and servitudes, was, or still is, subject to regulation by any Board of Supervisors of said State, as provided in said Act of 1885, was irrelevant, immaterial, and impertinent.

And that the denial that at the said rate of \$3.50 per acre, per annum, for irrigation, together with rates for domestic use, if water should be demanded and used upon the whole of the land which the said system is able to supply with water, said company would not be able to pay its operating expenses and maintain from such rentals its plant and system, and the denial that by reason of said established rate said company was

losing money, and the denial that the plant of said company is going to decay, without sufficient resources from said rate for replacing the same, and that the denial that said company at said rate of \$3.50 will be compelled to furnish water to consumers at any loss, or that, if said rate of \$3.50 is maintained, said system will be lost, are immaterial, irrelevant, and impertinent.

And that the allegations of the requirements as a condition to the refraining by said company and its Receiver, from shutting off the supply of water to each of your orators under their respective water rights and asements, that your orators should subscribe and execute the agreement, designated "Application for water," set forth in the answer, *was* immaterial, irrelevant, and impertinent.

And that the denial that any increase of the said rate of \$3.50 is at all necessary to enable said corporation, or its Receiver, to maintain and operate said water plant, and pay the expenses of the maintenance and operation thereof, is irrelevant, immaterial, and impertinent.

That the allegations relating to the amount in controversy as to each of your orators and as affecting the jurisdiction are irrelevant, immaterial, and impertinent.

And that the allegations of the answer which rely upon and invoke the application of the provisions of

Section 1 of Article XIV and of Article V of the amendments to the Constitution of the United States, and which rely upon and invoke the application of Section 1 of Article I and of Section 9 of Article XX of the Constitution of the State of California, and which rely upon and invoke Section 11 1-2 of the amendment of the act of March 12, 1885, of the State of California, set forth in said answer, and each of them, are immaterial, irrelevant, and impertinent.

Seventh. Because the court, by its ruling upon said demurrer, and by its decree herein, overruled the third assignment of error set forth in said bill of review.

And thereby erroneously ruled that the court properly ruled in the original cause, upon exception second to the answer, that the said answer was evasive and uncertain in that it did not show which of the defendants to said original cause acquired their water rights from the San Diego Land & Town Company of Kansas by purchase, and how much they paid therefor to said company, although the bill of complaint in said original action alleges that each of the defendants thereto was the owner of a water right by purchase or otherwise, and alleges that each of the defendants thereto was the owner of a water right by purchase or otherwise, and alleges no distinction or discrimination between such rights, whether acquired by purchase or otherwise, and calls for no answer as to which became owners of such rights by purchase or which became owners otherwise, and although said answer shows

that the water rights, easements, and servitudes, however acquired, are each in freehold, that each was created by said corporation of Kansas, and that compensation for each has been paid, or that satisfaction has otherwise been made to said corporation for the same.

Eighth. Because the court, by its ruling upon said demurrer and by its decree herein, overruled the fourth assignment of error set forth in said bill of review.

And thereby erroneously ruled and adjudged that the court in the original cause correctly sustained the third exception to the said answer, and erroneously reaffirmed the ruling on said exception that it is admitted by said answer that the actual and just cost of the water works and system of the said San Diego Land & Town Company of Kansas is \$750,000, and erroneously reaffirmed the ruling on said exception that it affirmatively appears from said answer that the annual rental of \$7 per acre will not, and cannot, realize to the San Diego Land & Town Company of Maine six per cent net increase per annum on its investment.

And erroneously reaffirmed the ruling on said exception that the law of the State of California allows said company as against these appellants, defendants to the original bill, as a reasonable return on their investment, not less than six nor more than eighteen per cent net on the value of said plant and system, without regard to the water rights, easements, and



servitudes acquired by each of said defendants from said San Diego Land & Town Company of Kansas, and owned by them respectively as set forth in the said answer, and without regard to the agreements of said company with your orators as to the annual rate of 3.50 per acre, per annum, and without regard to the of \$3.50 per acre, per annum, established by said corporation at the time when said water rights, easements, and servitudes respectively rested in said defendants, and ever since collected, all as set forth in said answer.

Ninth. Because the court, by its ruling upon said demurrer and by its said decree, overruled the fifth assignment of error set forth in said bill of review.

Whereby it erroneously reaffirmed the former ruling sustaining the fourth exception to said answer that said exception was sufficient in form to point out to and inform the defendant what matters in said original bill were not well or sufficiently answered or respecting which the denials or averments of the said answer are evasive, imperfect, or insufficient.

Whereby it erroneously reaffirms its ruling sustaining admissions, or averments in said answer are evasive, imperfect, and insufficient.

Tenth. Because the court, by its ruling upon said demurrer, and by said decree, overruled the sixth assignment of error set forth in said bill of review.

And whereby it erroneously reaffirms its ruling sus-

taining the exception numbered fifth to the answer that the question whether it appears from the answer of the defendants that the complainant Receiver has legally established and is entitled to collect the water rental of \$7 per acre, per annum, for the irrigation of the lands of each of the defendants respectively, is properly triable upon exception to the answer.

And whereby it erroneously reaffirms its ruling that it appears affirmatively or otherwise from said answer that said corporation of Kansas and the said Receiver, complainant, had or has legally established and is entitled to collect a water rental of \$7 per acre, per annum, for the irrigation of the lands of the defendants or any of them.

And whereby it erroneously reaffirms its ruling that the said defendants had no standing in said court to contest the reasonableness of the rate of \$7 per acre, per annum, demanded by the complainant to such original bill, but that their remedy, if any they had, was to apply to the Board of Supervisors of the county in which their said land is situated, to fix and establish the rates to be paid for such water.

And whereby it erroneously reaffirms its ruling in so construing and applying to this cause the statute of California approved March 12th, 1885, referred to in the original bill of complaint, as that said statute operated and operates to deprive each of said defendants of his, her, and its water rights, easements, and servitudes, and of the right to enjoy the same at

the rate of \$3.50 per acre, per annum, actually established and collected by said corporation and as established by the contracts, all as in said answer set forth and all without due process of law, and to deprive said defendants of their liberty to contract for their said water rights, easements, and servitudes without due process of law, and to deny to each of said defendants the equal protection of the laws, all in contravention of Section 1, Article XIV, of the amendments to the onstitution of the United States and Article V of the amendments to the onstitution of the United States, and erroneously rules that said statute so construed is not in conflict with Article I, Section 1, of the Constitution of the State of California and is not in conflict with Section nine (9), Article twenty (20), of the Constitution of the State of California.

Eleventh. Because the court, by its ruling upon said demurrer, and by its decree, overruled the seventh assignment of error set forth in said bill of review.

And whereby erroneously reaffirms its ruling on the sixth exception to the said answer; that such exception did properly raise and present the question whether said answer shows on its face that complainant is legally or equitably entitled to collect the rate of \$7 per acre for irrigation of the lands of said defendants, and whether said raised rate was reasonable and just.

And erroneously reaffirms its ruling that the facts

set forth in said answer sustain the charge set forth in said sixth exception.

Twelfth. Because the court, by its ruling upon said demurrer and by its decree, overruled the eighth assignment of error set forth in said bill of review.

Whereby it erroneously ruled that the order made and entered December 6, 1897, in said original cause substituting the San Diego Land & Town Company of Maine, as complainant, in place of the original complainant, Charles D. Lanning, Receiver of the San Diego Land & Town Company of Kansas, was not irregular nor in disregard of rule 57 of the rules of practice of the courts of equity of the United States; and further erroneously overruled and disallowed the showing of error that by virtue of said order of substitution the said defendants to said original bill were denied opportunity to demur, plead, or answer to any supplemental bill setting forth any alleged interest in said cause of the San Diego Land & Town Company of Maine.

Thirteenth. Because the court, by its ruling upon said demurrer and by its decree, overruled the ninth assignment of error set forth in the bill of review.

Whereby the court erroneously reaffirmed its order, entered in said cause January 3, 1898, that the original bill of complaint be taken *pro confesso* against said defendants for want of an answer for that, notwithstanding the sustaining of the exceptions for immateriality, irrelevancy, and impertinence to all those

parts of the answer set forth in exception numbered first and the expunging the same, the admissions, denials, and averments in the answer not excepted to raised material issues in said cause; that such remaining admissions, denials, and averments of said answer show in substance that said San Diego Land & Town Company of Kansas was the owner of a water system and franchise, as set forth in its articles of incorporation, shown in the answer; that said corporation completed its said system in Feb., 1888; that how much money said company expended up to January 1, 1896, in acquiring and constructing said system the defendants had no knowledge, information, nor belief.

That the right and title of said company to its said water system is subject to the rights of the defendants respectively as follows: That each defendant owning land, as alleged in the complaint, has become the owner of a water right and a part of the water appropriated and stored by said company necessary to irrigate his and her land; that such water rights extend not only to the irrigation of the defendants' respective tracts of land, but also to supplying the needs of the persons resident and animals kept thereon respectively.

That each said water right embraces the right and easement of the service of the reservoir and distributing system of said corporation for the delivery of water at and upon said respective tracts of land for all uses by automatic gravity pressure existing under said system and including the right to have said corporation maintain said system efficiently to conduct

the water to and deliver the same on the premises of each of the defendants for irrigation and other uses at and for the annual rates to be deemed and accepted as the legally established rates therefor.

That at the times mentioned in the bill of complaint said company was furnishing the defendants and each of them with water through its said system; that said company has at all times treated its lands under irrigation from said system as being on precisely the same footing as to annual rates with the lands of each of the defendants and has entered upon its books the same rate per acre per annum chargeable to its own lands as that charged to the lands of defendants; that said Receiver has done likewise.

That the annual expense of said corporation to operate and maintain its water system does not exceed the sum of \$12,034.99.

That said company commenced to furnish water to consumers regularly in February, 1888; that in said month of February, 1888, it fixed and established and has since charged the rate of \$3.50 per acre as the annual rate for irrigation and no more until January 1, 1896.

That in order to pay the company the amount of its expenses and an annual income of 6 per cent upon the whole present cost and present value of its water system it is not necessary that the rates for water sold and consumed should exceed the sum of \$32,000 per annum; that the present cost and the present cash

value of the property constituting said water system does not exceed the sum of \$300,000, and that not over one-half of the capacity of said system was on January 1, 1896, in use.

And that not over two-thirds of the capacity of said system was in use when said answer was filed.

That in order to pay the cost of operating the plant of said company and maintain the same and pay said company as much as 6 per cent net annual revenue upon the present cost and cash value of its plant and water system, it is not, and will not, be necessary to charge a rate per annum of not less than \$7 for irrigation purposes or any sum in excess of \$3.50 per acre, per annum for irrigation purposes in connection with the rate for water for domestic use under said system actually established and collected.

That no petition has ever been presented to the Board of Supervisors of the county in which said system is situated for the fixing of water rates thereunder.

That said Land & Town Company and the complainant, Receiver, gave notice that on January 1, 1896, they would undertake to establish a rental of \$7 per acre, per annum, for water supplied to the respective lands of defendants.

That at the date of said notice the defendants were and for a long time prior thereto had been in the continued enjoyment of their said water rights and ease-

ments to the flow of the water thereunder, and were paying and always had paid to said company \$3.50 per acre, per annum, for each acre irrigated by each of them.

That each of the defendants refused to pay said rate of \$7 per acre, per annum; the admission that the defendants do maintain that neither the said Land & Town Company, nor said Receiver, has any legal or equitable right to fix the amount to be paid by any of them for such water for irrigation, and that the rate of \$3.50 per acre, per annum, actually established by said Land & Town Company by the contracts, conveyances, use, and practice as set forth in the answer, and which rate has at all times since the inauguration of said water system been collected and paid for the use of said water, must be and remain and of right ought to be and remain the established rate to be paid by these defendants for such use as against the said attempt of said company and the complainant to raise the same to \$7 per acre, per annum.

That Article XIV of the Constitution of the State of California and of the Legislative Act of the said State of March 12, 1885, included the provision that until water rates should be established by the Board of Supervisors, or after they should have been abrogated by such board, as in the said Act provided, the actual rates established and collected by each \* \* \* corporation then furnishing, or that should thereafter appropriate waters for sale, rental, or distribution to



the inhabitants of any county of said State, should be deemed and accepted as the legally established rates thereof.

The admission that in order to enforce the payment of said proposed rental of \$7 per acre, per annum, the complainant caused the water to be shut off from the premises of each of the defendants until such demanded rental should be paid.

The admission that the proposed increase of rates, if collected from all lands irrigated under said system, including those of said corporation, would increase the rentals collected by the company to not less than \$14,000 per annum.

The admission that the complainant Lanning was appointed Receiver, as alleged in the bill of complaint.

That all said matters and other matters in said answer not excepted to, taken together with the allegations of the bill of complaint, raised material issues in said cause.

And appellants say that by said erroneous reaffirmance of said order for taking said bill of complaint *pro confesso* each of the defendants was deprived of a hearing upon the merits of said unexpunged portions of the answer and the issues made thereby.

Fourteenth. Because the court by its ruling upon said demurrer and by its decrees herein overruled, the 10th assignment of error set forth in the bill of review.

Whereby the court erroneously reaffirmed its decision that the allegations of the original bill of complaint warranted the decree entered *pro confesso* in favor of complainant.

Fifteenth. Because the court by its ruling upon said demurrer and by its decree herein overruled the 11th assignment of error set forth in the bill of review.

Whereby the court erroneously ruled and held herein that its decree in said original cause was not, upon the allegations of the bill of complaint therein, against the statute law of the State of California entitled "An Act to regulate and control the sale, rental, and distribution of appropriated water," etc., approved March 12, 1885, and as amended by the Act of the Legislature of said State approved March 2, 1897, in this, to-wit:

That it appears on the face of said bill that the San Diego Land & Town Company of Kansas at the time when it commenced to furnish water to consumers, to-wit, in the year 1887, established the annual rate of \$3.50 per acre for irrigation, and that said corporation and C. D. Lanning, as its Receiver, from said date continually maintained and collected said rate and no more from all consumers and at no time collected any other rate, and that said rate at the time of filing said bill was and at the date of said decree remained the only actual rate established and collected by said corporation or its said Receiver, and that it further appears by the said bill that the Board of Supervisors of

the County of San Diego, mentioned in the complaint, had not fixed or established rates of yearly rental at which said San Diego Land & Town Company should furnish water to consumers.

And that by the said statute law it was and is provided that until such rates should be so established by such Board of Supervisors the actual rates established and collected by every such corporation should be deemed and accepted as the legally established rate thereof, and that said statute law further provided and provides that every such corporation furnishing water to lands, as did said Kansas corporation to the defendants (the appellants), as alleged in said bill, shall furnish such waters at rates not exceeding the established rates as fixed and established by such corporation as provided in said Act, and that said statute provided and provides that every such company shall be obliged to furnish such water at the established rates regulated and fixed therefor as in said Act provided to the extent of the actual supply of the waters of such corporation.

And that by said decree the appellants, defendants in said action, are deprived of the use of water from said system for irrigation at the rate actually established and collected by the San Diego Land & Town Company of Kansas at the time when said defendants respectively became owners of their water rights and at the only rates at any time actually established and collected by said corporation or its said receiver prior

to and since said vesting of the said water rights, to-wit, at the rate of \$3.50 per acre, per annum.

Sixteen. Because the court by its ruling upon said demurrer and by its decree herein overruled the twelfth assignment of error set forth in the bill of review.

Whereby the court erroneously holds that the decree in said original cause, upon the allegations of the bill therein, is not against the right of these appellants, named as defendants to said bill, in that said bill of complaint shows upon its face that your orators are the owners respectively of tracts of land under the water system of said San Diego Land & Town Company of

Kansas, and that your orators own and hold small tracts of land of only a few acres each, and said bill further shows that each of your orators respectively had become and was the owner of a water right to such part of the water appropriated and stored by said company as is necessary to irrigate his tract of land, subject to such yearly rental as said company was entitled to charge.

And that it further appears on the face of said bill that the annual expense of operating and keeping in repair the reservoir and water system of said company and of furnishing all consumers under said system is, exclusive of interest on the bonds of said company, the sum of \$12,034.99.

And that it further appears from said bill that the annual income from water rates collected under said system was \$25,715.00, and in that it further appears from said bill that the rate actually established and collected by said company for furnishing water for irrigation of the lands of your orators and *his* codefendants named in said bill under their said water rights was \$3.50 per acre, per annum, and that the proceeds of the same enters into the aggregate annual income of said water system.

And in that notwithstanding the said bill further shows that said company and the said C. D. Lanning, the Receiver of said company, the complainant therein, gave notice to your orators, defendants to said bill, that from and after January 1, 1896, they would demand a rental of \$7.00 per acre, per annum, for water for irrigation, being twice the rate up to that time actually established and collected by said company or its Receiver for furnishing your orators with such water and notwithstanding that said bill further shows that because your orators and each of them refused to pay said rate of \$7.00 per acre, and maintained that neither said Land & Town Company nor said C. D. Lanning, as Receiver thereof, had any legal right to increase the amount of rental to be paid by them or any of them, and maintained that the rate of \$3.50 established and collected by the said Land & Town Company must be and remain the established rate of rental, the said Receiver, in order to enforce the payment of said increased rentals, caused the said wa-

ter to be shut off from the premises of the defendants and each of them, and did deprive the appellants, defendants in said action, of the use and enjoyment of their said water rights upon payment of the rates of \$3.50 per acre, per annum, actually established and collected by said corporation and collected by said receiver.

Yet said rulings and decree upon the bill of review herein hold that said original decree does not erroneously hold, decide, and decree that said San Diego Land & Town Company of Kansas and Charles D. Lanning, Receiver thereof, had the right to increase the amount of the water rentals of said company for water furnished to the lands of said defendants from \$3.50 per acre, per annum, to the sum of \$7.00 per acre, per annum, without the consent of any of your appellants, and does not erroneously hold, decide, and decree that your appellants should be required to pay to the San Diego Land & Town Company of Maine said rate of \$7.00 per acre, per annum, for water furnished to their lands, as set forth in the said bill of complaint, from and after the first day of January, 1896, until the fixing and establishing of such rates by the Board of Supervisors of San Diego County, California, or the re-establishment thereof in accordance with law as a condition upon which water should be furnished them from said water system, and does not erroneously hold, decide, and decree that the San Diego Land & Town Company of Maine is authorized to shut off the supply of water for irrigation of such

lands of any of your appellants, the defendants to said bill, who should fail for five days to make such payment of arrears of said increase of water rate.

Whereby your appellants, the said defendants, are deprived of all benefit of the ownership of their wa- rights, and, notwithstanding said ownership, are re- quired as a condition to the enjoyment of their said easements to pay to said San Diego Land & Town Company of Maine an annual rate to yield, as appears by said bill, and excess over and above the actual cost of repairs, operation, and management of said water system as and for interest and net revenue upon the whole cost and value of said system and without re- gard to the servitudes thereon owned by your appel- lants.

Seventeen. Because the court by its ruling upon said demurrer and by its decree herein overruled the thirteenth assignment of error set forth in the bill of review herein.

Whereby the court erroneously reaffirmed its de- cree in said original cause and holds that said decree on its face and on the face of said original bill does not enforce legislation of the State of California, so con- strued as that it is in violation of Section one (1) of Article XIV of the amendments of the Constitution of the United States, in that the legislation, so con- strued and enforced, maintains the San Diego Land & Town Company of Kansas and C. D. Lanning, its Receiver, in increasing the water rentals for water fur-

nished to the lands of your appellants for irrigation of their respective lands from \$3.50 per acre, per annum, to \$7.00 per acre, per annum, for such irrigation without the consent of your appellants, and in that said legislation, so construed and enforced, justifies and maintains the said Kansas corporation and the said Receiver and the San Diego Land & Town Company of Maine in having shut off the flow and use of the water under the water rights owned by the defendants to said bill from the lands of such defendants( the appellants), as shown in said bill, for refusal to pay such increase of rate, and in that said legislation, as so construed and enforced, requires said defendants to pay the San Diego Land & Town Company of Maine the rate of \$7.00 per acre, per annum, for water furnished their lands, as set forth in said bill of complaint, from and after January 1, 1896, as the condition upon which water shall be furnished them from said water system, and in that the legislation, so construed and applied, authorizes said last-named corporation to shut off the supply of water to any defendant who shall for five days fail to pay such increase of rate; by which means each of your orators is deprived of his, her, and its property without due process of the law, and each is likewise deprived of the equal protection of the laws, and each is likewise without due process of law deprived of his, her, and its liberty to purchase or otherwise acquire the water rights in the complaint referred to and is deprived of his, her, and its liberty to have the benefit of any acquisition, as in the complaint set forth, of such water rights.



And whereby it was erroneously held that said decree is not, for the reasons—in contravention of Article V of the amendments to the Constitution of the United States, as being an exercise of the judicial power of the United States, whereby your appellants are deprived of their property without due process of law, and whereby they are deprived, without due process of law, of their liberty to contract and acquire property.

Eighteen. Because the court, by its ruling upon said demurrer and by its decree herein overruled the fourteenth assignment of error set forth in the bill of review herein.

Whereby the court erroneously held herein that it was not error apparent in said original decree, in that it was entered *pro confesso* and without proofs upon the allegations of the bill and without regard to the expunged portions of the answer and without regard to the portions of the answer expunged on said exceptions filed September 22, 1897, and because it ruled, in conformity to the opinion filed in said action Sept. 14, 1896, adopted by and referred to in said decree, that, notwithstanding the alleged fact that \$3.50 per acre, per annum was the only rate for water supplied for irrigation that had been established and collected by said San Diego Land & Town Company of Kansas or said Charles D. Lanning, Receiver, that said San Diego Land & Town Company and Charles D. Lanning, Receiver, had the right to increase the

amount of the water rentals of said company for water furnished to the lands of defendants (your appellants) from \$3.50 per acre per annum to the sum of \$7.00 per acre, per annum, for such irrigation, and that the contracts with respect to the rates of \$3.50 per acre, per annum, set forth in the answer were void as being in conflict with the Constitution and laws of the State of California; and because it ruled that your orators had no right to be heard before the court on the questions of this reasonableness of the rates of \$7.00 per acre, per annum, which the complainant in said action sought to enforce and which said decrees enforces, and because it ruled that the defendants to said bill of complaint (your appellants) were not entitled, upon the question of the rightfulness and lawfulness of the increase of the rate of \$3.50 per acre, per annum, to \$7.00 per acre, per annum, to have any benefit of the ownership of their respective water rights as set forth in the bill of complaint or of their freehold easements and servitudes upon said company's water system as set forth in their answer, nor of the alleged fact that each had paid or made satisfaction to said San Diego Land & Town Company of Kansas for the price demanded by it for his, her, and its such water right, easement, and servitude.

That in point of law, among other things, said errors, are, to-wit:

- 1st. Said decree in said respects erroneously con-

strues and applies the provisions of the constitution and laws of the State of California referred to in the bill of complaint and answer.

2nd. That said provisions of the constitution and laws as so constructed and applied by said decree are in contravention and repugnant to Article XIV, Section I, of the amendments to the Constitution of the United States, as depriving your appellants of their property without due process of law, and as depriving them of their liberty of contract without due process of law.

3rd. That in applying the said provisions of the State Constitution and statutes, as so construed by said decree and the opinion referred to therein, the judicial power of the United States was exercised in contravention of Article V of the amendments to the Constitution of the United States and deprived the defendants in said action (your appellants) of their property without due process of law and of their liberty of contract without due process of law.

4th. And that the provisions of Article XIV of the Constitution of the State of California, as so construed, applied, and enforced by said decree, are in violation of the guarantee by Section IV of Article IV of the Constitution of the United States of a republican form of government to said State of California, in that by said provision of the Constitution of said State as so construed, applied, and enforced the said State assumes the absolute control of all water appro-

priated and devoted to sale, rental, and distribution and the absolute control of all works devoted to the rights, easements, or servitudes in such water supply and water works; abolishes all supplying or distribution of such waters; abolishes all capacity for the acquisition of private property right to unite the ownership of any water supply from any such system with the ownership of lands for irrigation thereof by contract of purchase and payemnt or otherwise: abolishes all right or capacity for the acquisition of any water right, easement, or servitude in or upon any such water system by purchase or otherwise free from the perpetual obligation to pay net revenue, as the said statute now stands, or not less than six nor more than eighteen per cent per annum upon the cost or value of such water system, and abolishes all right or capacity to ascertain, fix, and define by contract or convention the rate or compensation to be paid by any consumer for the supplying of any such waters for irrigation of land.

Nineteen. Because the court by its ruling upon said demurrer and by its decree herein overruled the fifteenth assignment of error set forth in the bill of review herein.

Whereby the court erroneously held herein that there was no error apparent in said original decree, in that said decree is made in favor of the San Diego Land & Town Company of Maine, although said corporation has not become a party to the record in said

cause by supplemental bill or otherwise, and what interest, if any, said corporation hath or had in said action does not appear upon the record, nor was any claim on its part to any interest, so set forth that the defendants to said bill of complaint, your orators, could in anywise make answer thereunto or plead thereunto.

Twenty. Because the court by its ruling upon said demurrer and decree herein overruled the sixteenth assignment of error in the bill of review herein.

Whereby the court erroneously held herein that there is no error apparent in said original decree, in that this court was without jurisdiction to entertain said cause or to make any decree upon the merits therein.

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## ARGUMENT.

### I.

**Appellate Jurisdiction of this Cause is given to the Court by Sub-divisions 4 and 6 of Sec. 5 of the Judiciary Act of March 3, 1891, and extends to every question.**

Appeals may be taken from the Circuit Courts direct to the Supreme Court in the following cases *inter alia* (Act of March 3, 1891, Sec. 5).

(4) "In any case that involves the construction or application of the Constitution of the United States."

(6) "In any case in which the Constitution or law of a state is claimed to be in contravention of the Constitution of the United States."

The bill of review embraces the record history of the cause; and the court will look into it to ascertain whether application of the Constitution of the United States has been invoked in good faith in the several stages of the litigation, in vindication of alleged rights. *Carey v. Houston & Texas Central Railway* 150 U. S. 170, 181.

"The validity of a statute is drawn in question "whenever the power to enact it, as *it is by its terms*, "or *is made by construction*, is fairly open to denial and "is denied." *Miller v. Cornwall Railroad Company* 168 U. S. 131, 133; *Baltimore & Potomac Railroad v. Hopkins* 130 U. S. 210, 224.

In the case as presented by the bill of review, inquiry is fairly raised, and not as a moot question, within the rule stated in *Castello v. McConnico* 168 U. S. 674, 680, whether the application, as enforced by the court in the original cause, and in disposing of the bill of review, of the constitution and statutes of the state as construed by it, deprived the appellants of their liberty and their property without due process of law, and deprived them of the equal protection of the law.

Without anticipating the discussion of the merits of the constitutional questions in the later portions of this brief and particularly in sub-division VII thereof,

it is sufficient here to state that the Fifth and Fourteenth amendments were invoked against the depriving the appellants of their liberty to enter into contracts and against the depriving them of their vested property rights without due process of law and against the denial to them of the equal protection of the law in every stage of the proceedings after the filing of the original bill; in the answer to it (Trans. folios 52-53-54-55-56); in the issues of law arising on the exceptions to the answer (folios 86-87-88-89-90); also in the bill of review (folios 108, 111, 117, 118, 119, 120.)

The case proceeds upon such bill of review as on an original bill. 2 Hoff. Ch. Pr. 12.

The constitutional questions were preserved in the assignments of error on appeal, (folios 162, 165, 175, 176, 177, 178).

The case is therefore fully within the provisions of the judiciary act above quoted in respect of the appellate jurisdiction.

*Chicago, Burlington & Quincy R. R. Co. v. Chicago* 166 U. S. 226, 233-4; *Ballingham Bay v. New Whatcomb* 172 U. S. 314, 317; *Penn Mutual Life Ins. Co. v. Austin* 168 U. S. 685, 694.

The jurisdiction remains even though the court should not find it necessary to pass upon the constitutional questions under the sub-div. 6 of Sec. 5 of the Judiciary Act of 1891, as for example, in case it should hold that the construction by the learned Circuit

Court of the State Constitution and laws to be incorrect. *Holder v. Aultman* 169 U. S. 81, 88-9. But the original answer also invoked the Fifth Amendment against the claim and acts of the Receiver. And the bill of review invoked the same amendment against the rulings and decree in the original cause.

And since the Circuit Court was thus requested to construe and apply the Constitution to the acts of the Receiver, and to the rulings and decree in the original cause, this court has also jurisdiction under the subdivisions of Sec. 5, even though the lower court had declined or omitted to construe or apply it. *Cornell v. Green* 163 U. S. 75, 78. But the record shows that the constitutional questions were necessarily passed upon.

This court has thus acquired jurisdiction of the entire case and of every question involved in it, and not merely of the constitutional questions. *Horner v. United States* 143 U. S. 570, 576-7; *Carey v. Houston & Texas Central Ry.* 150 U. S. 170, 181; *Chappell v. United States* 160 U. S. 499, 509; *Press Publishing Co. v. Munroe* 164 U. S. 105, 110, 111; *Scott v. Duval* 165 U. S. 58, 71-4; *Holder v. Aultman* 169 U. S. 81, 88, 89.

## II.

**The Bill of Review for Error Apparent, on the Record was the appropriate method for presenting the questions of errors assigned as committed in the procedure and upon the merits, in the original cause; and such questions are substantial.**

The fourth ground of the demurrer to the bill of re-



view is that the remedy of the appellants is by appeal and not by bill of review; this was erroneously sustained by the court.

The bill is in full conformity to the practice in the high court of chancery in England within the meaning of the Equity Rule 90.

"If the bill is filed on the ground of error, the decree complained of must be contrary to some statutory enactment, or some principle or rule of law or equity, recognized and acknowledged, or settled by decision, or be at variance with the forms and practice of the court." 2 Daniell Chanc. Pr. 5th Edn. 1577. Cited by Fuller, Circuit Justice, in *Hoffman v. Knox* 50 Fed. 484, 490.

That the filing of bills of review in such cases is received practice, is abundantly evidenced by the reported cases in this court, among which are: *Whiting v. Bank* 13 Pet. 6; *Putnam v. Day* 22 Wall 60, 66-7; *Buffington v. Harvey* 95 U. S. 99, 100; *Ensminger v. Powers* 108 U. S. 292, 302-3.

In *Willamette Iron Bridge Co. v. Hatch* 125 U. S. 1-7, where, as here, the bill of review was demurred to, the demurrer sustained; and where the court below affirmed the decree in the original suit and dismissed the bill of review, the court said:

"On a pure bill of review, like one in this case, nothing will avail for a reversal of the decree but errors of law apparent on the record" (Citing cases). "Does any such error appear in the present case? The court below has decided in the negative. We are called upon to determine whether that decision is correct."

For the purpose of the hearing had upon what are properly to be considered exceptions to the answer, the facts alleged in the original bill and admitted by the answer, and the denials and new matter set forth in the answer, must be considered as admitted, and only matter of law is presented for decision, as in a case set down for hearing on bill and answer, with the exception that on such submission, the case is not immediately ripe for final decree. *Sanford Tool Co. v. Howe, Brown & Co.* 157 U. S. 312-316. *In re Sanford Fork & Tool Co.* 160 U. S. 247, 257.

In *McDougall v. Dougherty* 39 Ala. 409 it was said:

"On the question of error apparent that will justify "a bill of review, it is permissible to consult all the facts "which are apparent in the pleadings, in the process, "and its service, in orders, reports confirmed and opinions and decrees of the chancellor".

And in *Clark v. Killian* 103 U. S. 766, 769, it was held that taking all the circumstances to be as they were set out in the pleadings, the court had erred in point of law and "*consequently a bill of review was the proper mode of remedying the error.*"

In *Thompson v. Wooster* 114 U. S. 107, 111, 112, it was said of a decree upon a bill taken *pro confesso*: "It "cannot be impeached collaterally, but only upon a "bill of review, or (a bill) to set it aside for fraud. I "Daniell Ch. Pr. 696 1st Ed.; *Ogilvie v. Herne* 13 Ves. 563."

*Maynard v. Parcault* 30 Mich. 160, 161.

It was also said (Ibid. p. 114) that after entry of the decree *pro confesso*, and while it stood unrevoked, the defendants were, "barred and precluded from questioning its correctness here *on appeal*, unless on the face of the bill it appears manifest that it was erroneously and improperly granted."

Text books and decided cases hold the language, in substance, that if matter is erroneously stricken out of the answer on exceptions for impertinence, *the error is irremediable*. Story Eq. Pl. Sec. 267 and note, citing *Davis v. Cripps*. 2 Young & C. (N. R.) 443; *Attorney General v. Ricards* 6 Beav. 444; *Tucker v. Cheslure R. R. Co.* 21 N. H. 38; *Woods v. Morrell* 1 John Ch. 106. See also Daniells Ch. Pl. & Pr. Perkins 4 Ed. 759. Note 6. *Chapman v. School District* 5 Fed. Cases p. 483-4; *United States v. McLaughlin* 24 Fed. Rep. 823, 826. In the case last cited Judge Deady said:

"If I should be of the opinion that these portions of the answer are impertinent and strike them out, the Supreme Court (on appeal) would have no basis upon which to fully determine the question and render a proper decree; and it might become necessary to affirm an erroneous decision, because a *part of the defendants' case is not in the record*."

The foregoing authorities leave it doubtful whether correct practice upon appeal from a final decree *pro confesso*, would permit review of errors committed in sustaining exceptions to the answer, and in expunging the whole or any portions thereof from the record; although it is possible that such questions have been entertained upon appeals in cases where the decree

was not in form *pro confesso*. *Harrison v. Perca* 168 U. S. 311, 318; *In re Sanford Fork & Tool Co.* 160 U. S. 247, 248, 258.

But whatever may be the practice in case of appeal from the original decree, entered in form *pro confesso*, as to whether errors in ruling upon exceptions to the answer will be reviewed, it is not to be questioned that according to the course of equity, resort may be had to the pure bill of review to remedy such errors. See in addition to the cases above cited, *Gallatin Coal, Land & Oil Co. v. Davis*. (W. Va. 1897) 28 S. E. Rep. 747, 748. S. C. 44 W. Va. 109.

A bill of review will lie if the decree is not warranted by the allegations of the bill. *Thompson v. Wooster supra*; *Goodhue v. Chamberlain* 1 Barb. Ch. R. 596; *Griggs v. Gear* 3 Gilman (Ills) 2, 14; *Prentiss v. Paisley* 7 So. R. 56, 57. S. C. 25 Fla. 927; *Shilling v. Hart* 20 Fla. 235; *Hart v. Shilling* 21 Fla. 136; *Maynard v. Percault supra*, 30 Mich. 160, 161.

The expunged portions of the answer presented questions of the existence, nature and extent of alleged statutory and contract rights of property set up against the claim of the plaintiff to raise the annual water rate; they also invoked provisions of the Constitutions of the State and of the United States in protection of such rights. Some of these questions the court below treated as of sufficient pertinence to bestow upon them elaborate consideration. It cannot be that allegations of this character are impertinent or

that they raise immaterial questions. It is submitted that the bill of review was the appropriate method of presenting these questions, and that the questions themselves are not frivolous, but grave and substantial in character.

### III.

## **Irrigation Easements an Institution of Private Property.**

**In the arid region of the United States, rights to the flow and use of water from the property of one owner for the irrigation of lands of others are an institution of private property, born of necessity, developed by custom, and confirmed by law; and such rights are estates in land.**

The leading questions in this case, and the provisions of the State Constitution and laws involved, cannot be dealt with intelligently, without taking into primary consideration water rights for irrigation, considered as an institution of private property. The origin and growth of this class of property in the Pacific and Rocky Mountains States and Territories, is a subject of <sup>s</sup> fascinating interest; it invites the student of law to an intimate view of the process by which there has grown up an indigenous class of property rights, taking its origin in over-mastering needs, fostered by the instinctive traits of the Anglo Saxon race, which make for social order and individual rights (98 U. S. 457), and finally recognized by all the courts, and confirmed by legislation. In the exercise and unfolding of these rights, the student of economics surveys with wonder

and admiration the transformation of a land quaintly and graphically described by a Mormon historian "as "a desolation of centuries, where the earth seemed "heaven forsaken, where hermit nature watching, "waiting, weeped and worshipped God amid eternal "solitude."<sup>1</sup>

All this change has been wrought since July 24, 1847, when it is said the first attempt was made "by the Anglo Saxon race to reclaim arid lands."<sup>2</sup>

The course of this development upon public lands of the United States, which comprised virtually the whole of the water yielding land in that region, as reflected in the decisions of this court, is marked by the cases of *Atchison v. Peterson* 20 Wall. 507, *Bacey v. Gallagher* *ibid* 670; *Jennison v. Kirk* 98 U. S. 453, *Broder v. Water Co.* 101 U. S. 274; and the suggestive state of facts with which the court dealt in the recent case of *United States v. Rio Grande Irrigation Co.* 174 U. S. 690.

The case last referred to, reviews the congressional history of these property rights, and cites the Act of 1886 (14 Stat. 253; Rev. Stat. 2339); the Act of 1877 (19 Stat. 377); and that of March 3, 1891 (26 Stat. 1101); and concerning them says, (p. 706):

"Obviously, by these acts, so far as they extended, "Congress recognized and assented to the appropriation of water in contravention of the common-law "rule as to continuous flow".

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(1) *Irrigation in Utah*, John Hopkins University-Studies (1899) C. H. Brough, p. 6.

(2) *Ibid*, p. 1.

And in the same case it was said at page 704:

"Notwithstanding the unquestioned rule of the common law in reference to the right of a lower riparian proprietor to insist upon the continuous flow of the stream as it was, and although there had been in all the Western States an adoption or recognition of the common law, it was early developed in their history that the mining industry in certain states, the reclamation of arid lands in others, compelled a departure from the common-law rule, and justified an appropriation of flowing water both for mining purposes and for the reclamation of arid lands, and there has come to be recognized in those states, by custom and by state legislation, a different rule—a rule which permits, under certain circumstances, the appropriation of the waters of a flowing stream for other than domestic purposes."

The following is from the Act of 1866, Rev. St. Sec. 2339:

"Whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing or other purposes, have vested and accrued, and the same are recognized and acknowledged by the local customs, laws and decisions of the courts, the possessors and owners of such vested rights shall be maintained and protected in the same; and the right of way for the construction of ditches and canals for the purposes herein specified is acknowledged and confirmed."

Speaking of this statute, the court said in the case last cited, p. 704.

"The effect of this statute was to recognize, so far as the United States is concerned, the validity of the local customs, laws, and decisions of courts in respect to the appropriation of water. In respect to this, in *Broder v. Water Co.* 101 U. S. 274, 276 it was said:

"It is the established doctrine of this court that  
 "rights of miners, who had taken possession of mines  
 "and worked and developed them, and the rights of  
 "persons who had constructed canals and ditches to be  
 "used in mining operations and for the purpose of ag-  
 "ricultural irrigation, in the region where such ar-  
 "tificial use of the water was an absolute necessity,  
 "are rights which the government had, by its con-  
 "duct, recognized and encouraged and was bound  
 "to protect before the passage of the Act of 1886."  
 "We are of the opinion that the section of this Act  
 "which we have quoted was rather a voluntary recog-  
 "nition of a pre-existing right of possession, constituting  
 "a valid claim to its continued use, than the establish-  
 "ment of a new one."

See also Act of July 9, 1870, Rev. Stat. Sec. 2340, and the following of the earlier cases:

*Irwin v. Phillips* 5 Cal. 140.

*Schilling v. Reminger* 4 Colo. 100, 104.

*Coffin v. Left Hand Ditch Co.* 6 Colo. 443, 446-7.

*Labdell v. Simpson* 2 Nev. 274, 277.

For a very full citation of cases in several states, see *Union Mill & Mining Co. v. Douglass* 81 Fed. R. 73, 95-6.

The following is from the opinion in the case, in 6 Colo. *supra*, at page 446.

"The climate is dry, and the soil, when nourished  
 "only by the usual rain fall, is arid and unproductive;  
 "except in a few favored sections, artificial irrigation is  
 "an absolute necessity. Water in the various streams  
 "thus acquires a value unknown in moister climates.



"Instead of being a mere incident to the soil, it rises, when appropriated, to the dignity of a *distinct usufructuary estate, or right of property*. It has always been the policy of the national, as well as the territorial and state governments, to encourage the diversion and use of water in this country for agriculture; and vast expenditures of time and money have been made in reclaiming and fertilizing by irrigation portions of our unproductive territory. Houses have been built, and permanent improvements made; the soil has been cultivated, and thousands of acres have been rendered immensely valuable, with the understanding that appropriations of water would be protected. Deny the doctrine of priority or superiority of right of priority of appropriation, and a great part of the value of all this is at once destroyed."

The foregoing references sufficiently show that water rights on the public domain of the United States, grew into an institution of property by successive stages of progression in the following order; possession, custom, judicial decisions, statutes operating as grants.

They were initiated by possession taken by individuals and consolidated by the customs of communities; afterward they were sustained by the courts and confirmed by legislation. They are the freshest flower of the Anglo-Saxon characteristic of individual, as distinguished from state-led enterprise.

What is thus true of water rights acquired on the public land of the United States, is similarly true of the acquisition of like rights upon public lands of this

state. *Lux v. Haggin* 69 Cal. 255, 374-6, 446-7; *Osgood v. Water Mining Co.* 56 Cal. 572, 580. *Wood v. Etiwanda Water Co.* 122 Cal. 152, 158-9. Civil Code Secs. 1410, 1421, copied in appendix hereto.

An institution of property, sufficiently virile, thus to force itself upon the public domain, in contravention of the common-law doctrine of riparian rights, and to secure recognition in the jurisprudence and legislation of the states and United States, has for the same reasons flourished in connection with private ownership of land whether under Spanish or Mexican grants or grants from the United States or the State. The same law of necessity which gave rise to the institution, operates more widely, variously and imperatively as population and the occupation and use of the soil increase. The law reports of all the States and Territories of the arid region are thickly studded with cases, in ever increasing ratio, in which figure water rights in all the varieties of interest, and incident arising from private ownership under the free play of social activity.

#### B.

**Easements for Irrigation are interests in the real estate constituting the water system.**

The subject of Section 2339 Rev. Statutes is "rights to the use of water." In Sec. 2340 Rev. Stats. the term "water rights" is employed disjunctively, with the phrase "rights to ditches and reservoirs used in connection with such water rights". Title VIII of

the Civil Code of California copied in the appendix, which treats of the right to the use of running water, that may be acquired by appropriation, bears the title "*Water Rights*." Article XIV of the State Constitution (see appendix) is headed "*Water and Water Rights*" and deals with water devoted to sale, rental or distribution.

The common characteristic of all these water rights for irrigation, is the use of water from land for the irrigation of other land. It is in this sense that the original bill in this case uses the phrase, when it alleged "*that each of said defendants has, by purchase or otherwise, become the owner of a water right, to a part of the water appropriated and stored by said company, necessary to irrigate his tract of land,*" (Trans. p. 9).

The reservoir, dam, and the land occupied by the water mains and pipes of the system and including them, together with the water rights appurtenant thereto, are doubtless corporeal property—real estate—the title to which was in the corporation.

*Reed v. Spicer* 27 Cal. 58, 63.

*Fudickar v. East Riverside Irri. Dist.* 109 Cal. 29, 36-8.

Are the "water rights" in this system of which the bill alleges that the appellants are the owners, and which the answer more fully describes, incorporeal interests in this corporeal property of the company, annexed to the lands of appellants? This is not a

merely academic speculation, but a question of practical and vital importance in the cause.

One solution given to it, may lead to the conclusion, that it is possible in this State, through the medium of contracts with water corporations, to effect a substantial unity of title to land and water supply; that the tiller of the soil may by purchase, or acquisition otherwise, of water rights from the corporations, free himself either wholly or beyond a stipulated limit, from a perpetual obligation to render to them net revenue on valuations and re-valuations of the water systems; and, that at the same time the corporations may realize upon their investments, by sales of interests in such systems to the owners and irrigators of land.

Or, a different solution may lead to the opposite conclusion, that the titles to land and water are, and must remain, separated by an impassible gulf not to be bridged by contract or treaty; that irrigators of land, because forbidden to buy, must forever pay an interest guaranteed by the strong arm of the law, on the investments of the companies; and that the corporations, because they may not sell, are doomed to have their principals locked up in perpetuity, producing only annual rates, and per<sup>n</sup>ennial crops of law suits over them, because it is forbidden to settle such rates by contract.

As we understand the judgment of the learned court below, these latter alternatives are those which its opinion and decision tend to advance.

We venture to believe that a correct conception of the nature of the interests designated "water rights", such as are disclosed upon the face of the pleadings in this cause, furnishes a solid basis for the construction and application of the provisions of the State Constitution and statutes, relating to the subject, and for testing from all points of view, the validity of the theory upon which the case was disposed of at the circuit.

A conflict of opinion arose between the Court of Appeals and the Supreme Court of Colorado upon the question whether such water rights constituted a property interest in the water system. It was not denied by either court that such rights might be created by contract, and those involved in the conflict, were so created. The Court of Appeals in the case of *Wyatt v. Laramie & Weld Irrigation Co.* 29 Pac. R. 906, 913, used the following language:

"By the purchase of rights the purchaser acquired 'no property interest in the canal, or to any water appropriated by the canal company, except the amount 'agreed to be delivered.'"

But the Supreme Court on appeal reversed the judgment of the Court of Appeals and in course of their unanimous opinion, reasoning from principles and citing authorities of the common law, say, (33 Pac. R. 144, 147):

"The plaintiffs allege a right to have a certain quantity of water flow through the irrigation company's 'ditch. This right is an easement in the ditch. It is

"a right annexed to the realty, and, being a perpetual right, is an incorporeal hereditament, descendible by inheritance to plaintiffs' heirs, and hence a *freehold estate*."

This conclusion was adhered to upon a re-hearing. *Ibid* p. 150.

In the case of *Empire Land & Canal Co. v. Board of Comm's* 40 Pac. R. 449, 451, on error to the Court of Appeals, it was said by the Supreme Court of the same State.

"But in view of the variance between the courts on this question, as shown in *Wyatt v. Irrigation Co.* 18 Colo. 298, 33 Pac. 144, which was decided long after the judgment in the present suit, some reference ought to be made to one paragraph of the opinion rendered by the other court. It is said therein, 'the right to demand water from the ditch, and have a given quantity per second delivered from the ditch to the consumer, carries with it no property interest in the ditch itself. It is, at most, but a contract sounding in damages in case of non-performance on the part of the corporation.' . . . . . *As a declaration of law as to the nature of this class of water rights, we would be compelled, in a proper case to hold it erroneous, and at variance with the rule that was settled in the Wyatt case supra.*"

*Chicosa Irri. Ditch Co. v. El Moro Ditch Co.* (Court Appeals Colo. 1897) 50 Pac. Rep. 731, 733.

The decisions of the Colorado Supreme Court are of special significance in view of the fact that by the Constitution of that State, the unappropriated water of every natural stream is declared to be the property of the public, subject, however, to appropriation. (Appendix.)

*In Nellis v. Munson* 108 N. Y. 453, 460, 15 N. E. 739 741, the court, after stating that the main question was whether the right to bring water across the lands of one for the benefit of another constitutes an interest "in fee and a freehold estate" said:

"It seems to follow, necessarily from the authorities, that an easement to draw water through pipes "over the land of another for the benefit of a dominant "tenement, is an interest in lands existing independent of "the fee of the land over which it is exercised, and is an "estate in land possessed in fee by the owner of the dominant estate. It is an incorporeal hereditament consisting of an estate of inheritance, transferable according to the statute of descents, and comes directly within the terms "fee and freehold estate" as used "in section 137."

In *Pinkum v. City of Eau Claire* 81 Wis. 301, 51 N. W. 550, a case of a canal easement, it was said, citing 2 Bl. Comm. C. 7, pp. 106, 107, among other authorities:

"The easement is also in perpetuity. That an easement may be created in fee is well settled. The fee of land may be in one person, and the fee of an easement upon such land in another."

So in *Branson v. Studebaker* 133 Ind. 147, 33 N. E. 90, 103-4, it was said:

"All easements are estates in land. A fee may exist in all estates in land; therefore a fee may exist in "an easement."

10 Am. & Eng. Enc. of Law, 2nd Ed. Easements p. 403 and note 1.

"All easements and profits *a prendre* may be held "for life, in fee or for years. Strong J. in *Huff v. McCauley* 53 P. St. 206. The interest of an easement "may be a freehold or a chattel one, according to the "duration. Wash. E. & S. p. 6. A perpetual easement is a freehold."

Turning now to the legislation of the State of California there is found, as would be expected in its Civil Code, that irrigation easements have their place in the statute law. We have printed in the appendix the provisions of the chapter headed "Servitudes", and quote here only the particular provisions defining the easement.

"Sec. 801. The following land burdens or servitudes on land may be attached to other land as incidents or appurtenances, and are then called easements. . . . . 9. The right of receiving water "from or discharging the same upon land. . . . . "11. The right of having water flow without diminution or disturbance of any kind."

"Sec. 806. The extent of a servitude is determined "by the terms of the grant, or the nature of the enjoyment by which it was acquired."

The chapter on servitudes from which the above provisions are quoted is perhaps entirely a codification of well settled principles of the common law. But the legislature evidently deeming more specific legislation needful to give security to water rights, for irrigation, on April 3, 1876, enacted what became a section of the Civil Code, which is as follows:

"Sec. 552. Whenever any corporation, organized "under the laws of this State, furnishes water to irri-



"gate lands which said corporation has sold, the right  
 "to the flow and use of said water is and shall remain  
 "a perpetual easement to the land so sold, at such  
 "rates and terms as may be established by said corpor-  
 "ation in pursuance of law. And whenever any per-  
 "son who is cultivating land on the line and within  
 "the flow of any ditch owned by such corporation,  
 "has been furnished water by it to irrigate his land,  
 "such person shall be entitled to the continued use of  
 "such water, upon the same terms as those who have  
 "purchased their land of the corporation."

Inasmuch as neither the Kansas nor the Maine cor-  
 poration were organized under the laws of this State,  
 the following Section of Art. 12 of the Constitution is  
 pertinent.

"Section 15. No corporation organized outside of  
 "the limits of this State shall be allowed to transact  
 "business within this State on more favorable condi-  
 "tions than are prescribed by law to similar corpora-  
 "tions organized under the laws of this State."

In this connection also is the statute of March 2,  
 1897, made part of the Act of 1885, set forth in the ap-  
 pendix which forbids any construction of the Act to  
 prohibit or invalidate any contract already made, or  
 which shall hereafter be made by or with any corpora-  
 tion \* \* \* \* "relating to the sale, rental or dis-  
 "tribution of water, or to the sale or rental of *ease-*  
*"ments and servitudes* of the right to the flow and use  
 "of water; nor to prohibit or interfere with the vesting  
 "of rights under any such contract."

The section 552 above quoted, though passed be-  
 fore the adoption in 1879 of the present State Consti-  
 tution, is enforced by the decision of the Supreme  
 Court as consistent with the "public use" declared by  
 Article 14 of that instrument. *Merrill v. Southside*

*Irrigation Company* (1896) 112 Cal. 426, 434-5. This case is referred to and recognized in the opinion of the Circuit Court in the case here under review. 76 Fed. R. 319, 333-4.

It may not be out of place to advert to considerations which lead in the arid region to specific legislation like that of such Section 552, tending to give definiteness and certainty to individual water rights for irrigation, and to the features which distinguish the relations of the works of an irrigation corporation to the land irrigated, from the relation to land of other public service corporations, such as railways; or, of a city water system to houses for urban uses, or of gas, or electric lighting plants, to the premises of those served by them. Of course there is to be considered, the primary fact that agriculture lies at the basis of civilization and of all social progress, and that stability and certainty of tenure of soil and water are indispensable conditions to its prosperity. The great excess of labor required on a given acreage tilled by irrigation, over that required on a equal area tillable without irrigation, leads to intensive cultivation, great expenditure for fertilization of the soil, and consequently to small tracts in individual ownership. In the case at bar, such ownership consists generally of only a few acres, the average perhaps not exceeding ten; in Utah, where water is comparatively more abundant as compared with the irrigable land, the average size of the irrigated farms is 27 acres (*Irrigation in Utah, supra* p. 75) with a tendency to decrease in

size of the farm unit. (*Ibid* 81.) In California, the development of the citrus and fruit tree industries, implies costly groves and orchards, dependent for life upon irrigation. It is the general condition that the amount of irrigable land far exceeds the available water supply. Hence, unless the supply of water to the irrigated land is assured in sufficient quantity at the proper time, there follows great pecuniary loss and inevitable distress.

But it is the experience of those who have earlier improved their lands, that subsequent comers seek to share in the supply beyond the safe "duty" of the water systems. Hence some principle must be found to protect the prior users as prior in right. Upon this subject Elliott J. in *Reservoir Co. v. Southworth* 21 Pac. R. 1028, 1032 (Colo.) said:

"A single illustration will suffice to show the disastrous consequences which would come if the pro-rating statute should be made the rule of distribution of water for purposes of irrigation instead of the rule of priority. An irrigating ditch is constructed, the first and only one, taking water from a small, natural stream. The first year five consumers apply for and receive each one hundred inches of water for irrigating of their land; the next year, the ditch being enlarged, five more apply and receive a like quantity; and the third year five more; and so on successively until thirty or forty consumers are located under the ditch. Perhaps the first five might be required to prorate with each other in time of scarcity, should their appropriations be practically equal in point of time; but under the statute, the first five would also be compelled to prorate with all subsequent consumers, until the amount of water that each would re-

"ceive would become so infinitesimally small as to be  
 "of no practical value, and would eventually be entire-  
 "ly wasted before it could be supplied."

The Supreme Court of California in *Merrill v. Southside Irrigation Co. supra* (112 Cal. p. 435) in expounding the policy of Sec. 552 Civil Code, *supra*, said:

"The object of the statute is quite evident. Water  
 "for irrigation is, in many pursuits essential to the  
 "productiveness of land, and if, when it has once been  
 "furnished the company so supplying it for such pur-  
 "pose may at will refuse such supply, the owner of ir-  
 "rigated land is at the mercy of the corporation who  
 "may ruthlessly destroy the crops of the season, or in  
 "case of orchards and vineyards the result of many  
 "season's industry by refusing to continue the supply  
 "of water."

Of course the very central legal principle in the acquisition of water rights by appropriation is that declared in the following section of the Civil Code.

"Sec. 1414. As between appropriators, the one  
 "first in time is first in right."

In *Nichols v. McIntosh* 34 Pac. R. 278, 280, involving the application of the constitutional safeguard of "due process of law" to the priority of a right, the court made use of the following language:

"It often happens that the chief value of an appro-  
 "priation consists in the priority over other appropria-  
 "tions from the same natural stream. Hence to de-  
 "prive a person of his priority is to deprive him of a  
 "most valuable property right. . . . . A priority of  
 "right to the use of water being property, is protected

"by our Constitution so that no person can be deprived of it without 'due process of law'".

In speaking of rights of priority to use of water, it was said by Elliott J. in *Reservoir v. Southworth* (Colo.) *supra*, 21 Pac. Rep. 1028, 1030:

"Every consumer cannot take water from the natural stream. Irrigating ditches and canals must be resorted to as a means of diverting and conveying water to places where it can be beneficially applied. *No good reason can be urged why a consumer, obliged to use such an agency, should not be protected equally with those taking water directly from the stream.*"

Indeed, the learned Circuit Judge speaks of vested rights in perpetual easements for irrigation of lands and their protection, in terms with which we fully concur.

He says in his opinion (76 Fed. R. p. 334). "Of course no company can be compelled to furnish water beyond its capacity. Indeed, consumers themselves are vitally interested in seeing that the capacity of the distributor is not overtaxed; so much so that in Colorado, it is held, *and properly held*, that a consumer who settles upon and improves land by means of water appropriated and distributed under and by virtue of the Constitution and laws of that State, giving to the first in time the first in right, can maintain a suit against the distributor of such water to prevent the spreading of it beyond the capacity of the system, so as to endanger the supply of those whose rights have already *vested*, and upon the faith of which they have invested their money and made their improvements. *Wyatt v. Irrigation Co.* (Colo. Sup.) 33 Pac. 144. *In California the same right is secured by statute as well as by judicial decisions.* . . . .  
"And by the provision of Sec. 552 of the Civil Code of

"California, a consumer whose *rights have once vested* "is protected from the injury of having his supply cut "off, for it in terms declares him entitled to the continued use of the water upon payment of the rates "established by law. Necessarily growing out of this "right to the continued use of water which he has acquired as a *perpetual easement to his land*, is the right "of such consumer to prevent, by injunction, if need "be, the distributor from disposing of or attempting to "furnish others beyond the capacity of the system, "thereby imperilling the rights of those already "vested."

One reason why no easements in favor of agricultural lands are recognized in railways, although their use is also public, is doubtless that there is no physical connection of railways with the lands of any of the individuals who in the aggregate constitute the public; another, that there is no such intimate and absolute dependency of the land upon the railway, or of the railway upon the land, or any such fixed interrelation as in the case of a water system, which can serve only a definite and assignable area and must serve specific tracts only. In the case of gas, electric light and power plants and city water systems for domestic supply, the analogy to irrigation systems is closer. They are connected with the premises served, by pipes and wires. In case of gas and electric light and domestic water supply each is generally adapted to being furnished continuously.

But analogies, however valuable as illustrations, must be cautiously used as foundations for conclusions. Neither public necessity nor popular practice has asserted perpetual easements in <sup>such</sup> lighting or

water systems; some reasons why they are not asserted are, that the uses are in fact fluctuating in amount, interrupted in time, shifting as to users and liable to cease in any structure altogether, either because it is no longer used, or the need is otherwise supplied; again, should population crowd upon the supply, there are available make-shifts or even other constant sources of supply attainable.

But in case of irrigated land, from its permanent character and needs, it follows that *a definite maximum amount of water*—as for example, a miner's inch perpetual flow to so many acres, or, as in the case of certain contracts set forth in the answer in this case, an acre foot per annum to each acre—must be reserved for it, so long as the right is not lost by the act or default of the owner, against all subsequent comers; and the land owner must in some form pay for this *maximum* amount because *it is reserved for him*.

It is this defined and continuous right, which constitutes the servitude upon the water system and becomes the perpetual easement to the land; and as is apparent, it arises out of the necessity of the environment.

There can be no rational question but that easements of the flow and use of water for irrigation are recognized by the laws of this State, as of this whole region, as an institution of private property; and that, without discrimination, whether they originate in appropriation on public lands of the State or the United

States; or upon property in individual ownership, or in the ownership of corporations, whether mutual or quasi-public, through grants from either of them express or implied, or by prescription, or under the circumstances defined in Sec. 552 of the Civil Code.

When acquired by appropriation (under Sec. 1411, Civil Code), the period for losing the same by non-user, for any beneficial purpose, is five years, in analogy to the period fixed by law for the ripening of an adverse possession of land into a prescriptive title.

*Smith v. Hawkins* 110 Cal. 122, 126-8.

Same case 120 Cal. 86-7.

When acquired by grant or contract it cannot be lost by adverse user short of the period for the limitation of actions to recover real property.

*People v. Farmers' etc., C. & R. Co.* (Colo. 1898.) 54 Pac. R. 626, 630.

The period for acquiring the same by mere prescription, is also five years, according to Sec. 1007 of the Civil Code, quoted and the cases cited later on.

The period for extinguishing a servitude acquired by enjoyment or prescription, is also five years disuse under Section 811 of the Civil Code Sub. div. 4 (appendix.)

*Smith v. Hawkins* 110 Cal. 122, 126 *supra*.

All of which emphasizes the fact that such easements are interests in real estate.



Considering the easements of the defendants somewhat in detail with regard to the manner of their creation, we submit :

That the corporation so far as the water supply was brought upon its own lands became in fact and in its own intent, the owner of both land and water in one estate.

It built its dam and pipe system as set forth in the answer, and threaded its land with a net work of pipes filled with water under gravity pressure from the water stored at a higher altitude in its reservoir.

When it sold and conveyed parcels of its land to certain of the defendants, unless the grants contained express exceptions of that portion of the corporeal estate which consisted of the water supply led upon the land, such supply passed with the land. Upon familiar principles, so much of the pipes as lay within the boundaries of the granted land, to the extent of their capacity necessary and adapted to supply that land, passed with the fee and in fee; and as to the reservoir and so much of the conduits as led up to and lay outside of the boundary of such land, upon the severance, there sprang up the relation of the servient estate to the land granted, as the dominant estate; in other words, the servitude upon the water system, so far as such system was not actually within the land granted, passed by the grant as an appurtenant easement; and as is well established by authority in this State, it

passed without express mention, and even without the use of the term "appurtenances" in the deed.

*Cave v. Crafts* 53 Cal. 135.

*Farmer v. Ukiah Water Co.* 56 Cal., 11.

*Fitzell v. Leaky* 72 Cal. 477.

*Standart v. Round Valley Water Co.* 77 Cal. 399.

*Coonradt v. Hill* 79 Cal. 587.

*McShane v. Carter* 80 Cal. 310.

*Crocker v. Benton* 93 Cal. 365.

*Clyne v. Benecia Water Co.* 100 Cal. 310, 314.

*Smith v. Corbit* 116 Cal. 587, 591.

The case last cited quotes and relies upon Sec. 3522 of the Civil Code, which is as follows:

"One who grants a thing is presumed to grant also  
"whatever is essential to its use."

See also Sec. 1104 Civil Code copied in appendix.

From other states we cite the following:

*Tucker v. Jones* (Mont.) 19 Pac. R. 571.

*Sweetland v. Olston* (Mont.) 27 Pac. R. 339.

*Cady v. Springville Waterworks Co.* 31 N. E. R.  
245, 246.

*Simmonds v. Winters* (Or.) 27 Pac. R. 8, 10.

*Hindman v. Rizor* (Or.) 27 Pac. R. 13.

*Frank v. Hicks* 35 Pac. 475.

*Eliason v. Grove* 36 Atl. R. 845.

"No one can acquire an easement in his own estate. But in the absence of an express grant of such right from another, an easement in water may arise; first by prescription; second upon severance of tenement."

*Gould on Waters* (1 Ed.) Sec. 329.

*Washb. on Easements and Serv.* (3 Ed.) p. 25.

*Quinlan v. Noble* 75 Cal. 250, 252.

*Dixon v. Schermeier* 110 Cal. 582, 585-6.

"The interest in an easement may be a freehold or a chattel one, according to its duration." Wash. E. & S. p. 6.

Are the easements of the defendants freehold or chattel interests in the system?

Sec. 552 of the Civil Code declares them to be *perpetual*.

The Supreme Court of Illinois upon mature consideration of the case of the right to build and maintain a ditch across the land of another after declaring such right a perpetual easement in *Chaplin v. Commissioner of Highways* 126 Ill. 264, 273, 18 N. E. R. 765, 766,

767, and after an instructive review of authorities, said:

"A perpetual easement in lands, or any interest in "lands in the nature of such easement, when created "by grant or any proceeding which is in law equivalent to a grant, constitutes a freehold."

Without aid from the statute (Sec. 552) there would be no difficulty in holding that the grants by the corporation of parcels of its land as irrigated land, where such land had been threaded with the pipes of the system built primarily to irrigate it, carried the freehold easement as appurtenant. So also under the express contracts for sale of land and water rights as one estate for a lump sum, in the form set out in the transcript, folio 30; and under the express contracts for sale of water rights making them appurtenant to other land for a sum in gross, in the form set out at folio 32, the easements passed in freehold.

And as respects those defendants who did not buy land of the corporation, and who did not take written contracts for the easement of "the flow and use of water"; but who prior to December, 1892, fell into and remain in that class of persons who "have been furnished water by it with which to irrigate their lands," under Sec. 552 of the Civil Code, we submit that the statute proceeding upon the voluntary act of the corporation, executes the conveyances to them of servitudes on the system at the established annual rate.

The intent of the statute is, to declare, in all cases where the corporation has voluntarily elected to furnish, and has begun to furnish water to lands not sold by it, at the same annual rates as to lands sold by it with the express or implied grant of water rights, and when upon the strength of this, the owner has improved and cultivated such land, that under such facts the law does not require the lapse of five years to create the servitude by prescription; but such servitude arises directly and the statute operates to make conveyance of the perpetual easement. It confers on the corporation the capacity to grant such easement, by doing the act prescribed, as fully as it could do by deed of grant.

In *Smith v. Green* 109 Cal. 228, 234-5 *supra*, it was said in the opinion:

"The general rule, no doubt, is that one who rests his claim to an easement in a verbal contract *alone*, unexecuted and unaccompanied by any other facts, has no rights thereto which he can enforce. But there are many cases where a mere parol license which has been executed, and where investment have been made upon the faith of it, have been held irrevocable (Gould on Waters Secs. 323, 324, and cases there cited); and, if the case at bar is to be determined alone upon the law governing parol grants, the rights of respondents, under the facts found, would be established by that law."

But in addition to all this, the answer shows that the defendants in this class as in all the others, except those who took express grants since December, 1892, have for more than five years prior to January 1, 1896,

continuously held and enjoyed their easements paying to the company the annual rate of \$3.50 per acre, on the same footing with all the other defendants; and it relies upon the statute of limitation applicable to the case, to establish them in their freehold easements.

Sec. 1007 Civil Code is as follows:

"Occupancy for the period prescribed in the Code of Civil Procedure, as sufficient to bar an action for the recovery of the property, confers a title thereto, denominated a title by prescription, which is sufficient against all."

Sec. 318 of the Code of Civil Procedure fixes the period at five years. (Appendix) *Clyde v. Benecia Water Co.* 100 Cal. 310, 314.

*Faulkner v. Rondoni* 104 Cal. 140, 146.

*Joseph v. Ager* 108 Cal. 517, 520.

It was as open to the corporation to have prior to 1892 established a price to outside lands for the water rights which it voluntarily annexed to them, as it was after that time; or as it did from the beginning as to its own lands by enhancing the price at which it sold them on account of their being connected with the water supply to an average of \$325 or more per acre for it in the sage brush.

That it did not do so, whatever the cause, cannot affect the present owners, many of whom are subsequent purchasers at prices increased by the water rights then actually annexed (trans folio 40). Much

less can the fact that the company waived any price for the water rights to this limited amount of land, affect those who acquired their easements by purchase from the company.

The answer shows that the lands of all these defendants fall within a classification made by the corporation and its receiver (trans. p. 24) as those "to which "the easement and flow of water for irrigation has been "annexed by consent or the voluntary act of the company."

And finally and conclusively the bill itself alleges that each of the defendants has, by purchase or otherwise, become the *owner* of a water right, to a part of the water appropriated and stored by said company necessary to irrigate his tract of land (trans. p. 9), subject only to such yearly rental as the company is entitled to charge and collect.

" 'Owner' in the general sense means one who has "full proprietorship in and dominion over property."

*Directors F. I. District v. Abila* 106 Cal. 355, 362-3.

*Johnson v. Crookshank* 21 Or. 339.

All these considerations, we submit, establish that the easements of each of these defendants is in freehold and that the price of the same has been fully paid to the corporation, or acquittance of the price has been made to the long-time satisfaction of the corporation.

From this it results that there is neither justice, nor equity, nor anywhere the rightful power to compel the purchasers of their easements to pay for the same thing again by way of increase of the annual rate to yield net revenue on the value of the easements. As to these lands, the element of net revenue, except as it is included in the established annual acreage rate of \$3.50, is for all time eliminated. And as to owners of all the other lands, the Sec. 552 of the Civil Code, in express terms, declares that "such persons shall be entitled to the continued use of said water, upon the same terms as those who have purchased their land of the corporation." This right the corporation had voluntarily recognized for more than the five years, necessary to create the title to the easements by prescription alone. And this parity of right is expressly conceded in the bill.

The importance of the consideration that all those easements are freehold estates, lies in the fact that if the corporation may increase the annual rate at all, beyond the rate at which the estates vested, in order to make or increase net revenue, then the grantor may at its pleasure, derogate from its grant. This may not be done directly or indirectly.

Hence also all the allegations in the bill relating to a bonded indebtedness of \$300,000 incurred by the corporation relate to a false quantity. The bill does not state whether the water system was mortgaged to secure any such indebtedness, nor does it state whe



it was incurred, whether before or after the vesting of these easements.

But if the indebtedness was incurred before the easements vested, even though it had been secured by mortgage on the system, then it was the duty of the corporation to protect its freehold grants of easements against it; if it arose afterward it could have no possible relation to the easements. So that in either case it does not lie with the corporation to throw the burden of its debt upon the owners of these easements.

It will be observed, as has been remarked in some of the cases, that these water corporations are in some respects *sui generis*.

In this State they must be considered as organized so far forth for the very purpose of the sale and rental of irrigation easements, as we take occasion hereafter more fully to show. All creditors of the corporation, even mortgage creditors upon the system, are bound by this important fact; and their rights must be subordinate to the leading purposes for which these corporations are granted their franchise. When the question shall arise, as it does not in this case, it may be found upon a full exploration of the public use in the water devoted to such sale and rental, that there is an important limitation upon the power of such corporations to mortgage, or rather as to what they can mortgage under their system, where they attempt so to do; and that this limitation differs from the case of

railway corporations and the like, in the fact that an essential function of the water corporations is to grant to individuals servitudes upon the water systems, which is not true of other corporations.

It may be found that the rights of creditors, mortgagees and others as against the owners of freehold easements, are circumscribed by what shall be deemed and accepted as the legally established rates at the time when the easements vested and at which they vested.

But in this case, as will appear, the court "cared for none of these things" and considered nothing but the abstract question of power of the corporation to raise rates in its discretion.

It is to be borne in mind that the matter of the current maintenance, management and operation of the water system, upon which servitudes, whether freehold or leasehold, are created, is entirely distinct from the grant of the easement itself; as distinct as <sup>a</sup>covenant to care for property is distinct from the grant of title to the property itself.

The distinction has always been recognized in the law of easements.

"It is in the nature of a servitude not to constrain "any one to do, but to suffer something, *ut aliquid patiatur aut non faciat.*"

Wash. Eas. & Serv. p. 5; *Bean v. Stevenson* 104 Cal. 49, 55-6. Goddard on Easements, pp. 18, 285, 443.

Austin's Jurisprudence, as abridged by Campbell (Holt Co. Publishers, p. 178) puts this clearly as follows in speaking of the *servitus* of the Roman law, as a right in *rem*:

"But this *negative* and *universal* duty, is the only obligation which *correlates* with the *jus servitutis*. Every *special* obligation which happens to regard or concern it is a duty answering not to the *jus servitutis*, but to some right extraneous or merely collateral to it; e. g. the *owner* of the subject may have *granted* an easement over it, and covenanted with the grantee for quiet enjoyment. The grantor here lies under two duties which are completely distinct, and disparate although the objects of the duties are the same; one of these duties arises from the *grant*, and thereby he is bound, like the rest of the world, to forebear from molesting the grantee in exercise of the right created by the grant—the other arises from the contract by which he is personally bound."

Another passage from the same keen analyst is as follows: (*Ibid* Holt & Co.'s Ed. p. 394):

"No right of servitude can consist in *faciendo*; i. e. can consist in a right to an *act* or *acts* on the part of the owner or other occupant. This follows from the very nature of a servitude, to which it is essential that it should be *jus in rem*, or a right availing against persons generally; for if it consisted in a right to an *act* to be done by the owner, or other occupant, it would be merely *jus in personam* against that determinate party."

"In the case of servitudes, the *jus in rem* may happen to be combined with a right to an *act* against the owner; e. g. a right to have a way repaired by the owner."

The distinction is strongly brought out in *Cole v. Hadley* 162 Mass. 579; 39 N. E. Rep. 279, 280, where holding that the grantor of a right of way is not bound to work the way so that it shall be fit for travel, unless he has promised so to do, the court go on to say:

"If the defendant promised to do this, it may be shown by oral evidence, as a collateral independent contract; but a right of way is an easement in land, which cannot be created by an oral promise or established by oral testimony if the statute of frauds is pleaded."

This distinction is in fact and substance, recognized by the statute of 1885, when in Sec. 4, it enjoins upon Boards of Supervisors to estimate as to water corporations, *first*, the value of all their property used and useful to the appropriation and furnishing of water; *next*, "their annual reasonable expenses, including the cost of repairs, management and operating such works"; and in Sec. 5, to so adjust rates "that the net annual receipts and profits thereof to said . . . . corporations shall not be less than six nor more than eighteen per cent upon the said value" of the water systems.

Therefore, *pro rei natura*, there is no embarrassment in considering the servitude apart from the maintaining it in operation; and so no difficulty in liquidating or making satisfaction of the purchase price of it once for all and in eliminating all questions of net rentals, while the annual expenses for maintenance, management and operation to be met by rates go on, as they must, because they are recurring expenses.

The personal duty of the corporation after having

granted the servitudes upon its system as appurtenant easements to the lands of the defendants, is to manage, maintain and operate its system. For the source of this obligation, we may, in all branches of this case, look to the clause in its corporate articles and franchise investing it with the power, and therefore the duty, of the "maintenance of dams and canals for the purpose of water works, irrigation, etc.," also to the general incidental powers recited at the close of the extract from its articles set forth in the answer (Trans. fol. 19). This is also consistent with its contracts that the water shall be delivered by it on the land irrigated. (Trans. fol. 30, 32).

And this duty is thrown upon it by its receipt of the annual rates.

Reference is here made to the distinction between the *jus in rem*, being the servitude proper, and the *jus in personam*, being the right to have the company maintain and operate the system, to point out that they have no necessary connection; that the price of the servitude may be paid or otherwise satisfied once for all; that when so satisfied the element of rates to yield net revenue is forever gone, except so far as included in the annual rate expressly consented to; while the compensation for the continuing maintenance and operation may, indeed must, go indefinitely.

## IV.

**Yet the Circuit Court ruled that no contract could be lawfully made between the owners of land and the corporation owning the water system, either for the creation of irrigation easements, or the terms upon which they should be enjoyed.**

So much of the opinion of the court below as holds that a water corporation has no right to exact payment of the price of a water right as a condition upon which it will furnish water at rates adjusted to yield both net revenue on the value of the system, and also the expense of maintenance and operation, concurred in. But pointed out that this furnishes no foundation for the position that the corporation cannot sell the perpetual easement if the irrigator is ready to buy at a lump price agreed upon.

We have thus far travelled in this argument in entire amity with the opinion of the court below, in recognizing the perpetual easements to the parcels of land owned by the appellants.

We follow it without disagreement one step further, in accepting the position that where water rates have been fixed by public authority to provide (using the terms of the Act of 1885) both for annual cost of repairs, management and operation of water works, and also to yield net annual receipts and profits upon their valuations, no right exists on part of the corporation to refuse to initiate (or when initiated under such rates to continue) a supply for irrigation of a given

tract of land unless in addition to such rates, the would be irrigator *purchases* and pays for his perpetual easement; for, it must be patent, that the corporation cannot have the legal right to "eat its cake and have it too;" it cannot ~~exact~~ and ~~hold~~ full payment of the value of the perpetual easement, and also have the legal uncovenanted right to collect net annual revenue in form of rates on that value.

It was said with undoubted correctness by this court in *San Diego Land & Town Company v. City of National City* (May 22, 1899,) 174 U. S. 739, 758-9:

"In our judgment, the defendant correctly says in its answer that the laws of the State have not conferred upon it or its Board of Trustees the power to prescribe by ordinance or otherwise that the purchase and payment for so called water rights should be a *condition* to the exercise of the right of consumers to use any water appropriated for irrigation or affected with a public use."

The learned Circuit Judge, Ross, uses in his opinion the following language (76 Cal. p. 333):

"It is impossible to reconcile the declarations of the Supreme Court of California in either of the two cases last referred to, or in any other case to which my attention has been called, with a right on the part of any corporation appropriating water under and by virtue of the Constitution and laws of California for sale, rental or distribution, to *exact* any sum of money or other thing, in addition to the legally established rates, as a *condition* upon which it will furnish to consumers water so appropriated."

This language, upon the assumption that "the le-

gally established rates" are fixed with a view to cover both maintenance and net revenue, we can also accept.

*Wheeler v. Irrigating Co.* (Colo. Sup. 1888) 17 Pac. 487.

*Combs v. Ditch Co.* (Colo. Sup. 1892) 28 Pac. R. 966.

*Northern Colo. Irrigation Co. v. Richards* (Colo. Sup. 1896) 45 Pac. R. 423, 425.

But this is not conceding that rates to embrace net revenue, can be increased by public authority, in cases where the easement has been bought and paid for; or otherwise voluntarily annexed by the corporation, at a rate then established; or that rates where they have been fixed by the express or implied agreement of the parties, or their established practice can be increased by public authority, in order to enhance the net revenue of the corporation.

Undoubtedly the laws of this State, as those of Colorado, and we suppose of every other State and Territory where irrigation is a necessity, extend to the land owner the right to elect between what our Constitution terms the appropriation of water for *sale* and that for *rental*. If he prefers, he has the right to render to the corporation furnishing water returns by way of annual rates, rather than to commute such rates, by making purchase and full payment in lump sum for the freehold easement.

Such a regulation of the relation between com-



panies and irrigators for the protection of the latter, seems to be perfectly in harmony with the devotion by the company of its property to the sale *or* rental of water, and within the legitimate exercise of the power of regulation, because of the natural monopoly which such companies have, affecting the public interest.

We fully agree then, that the land-owner, if he prefers, may enjoy his easement of water supply upon the principle of *renting* it, and so paying annually to the company over and above the current expenses of maintenance, a proper net revenue for the use of the easement; and, that he cannot be *compelled* to buy and pay for the absolute title to it, unincumbered by the obligation to pay net income.

But to conclude, as the opinion seems to do, (76 **Fed.** 333-337,) that because the corporation cannot *compel* the land owner to *buy* an easement, it must follow that, it cannot sell it to him, if he is willing to buy, as in the cases alleged in the answer, would be a pure specimen of the *ignoratio elenchi*—a perfectly irrelevant conclusion.

Here we part ways with the opinion.

#### A.

#### **Enumeration of Constitutional and Statutory Provisions involved.**

The Constitutional and Statutory provisions to be considered, are Art. XIV of the State Constitution; the Act of May 14, 1862; the Act of April 3, 1876; be-

ing Section 552 of the Civil Code; the Act of March 12, 1885; and the Act of March 2, 1897, adding a section to said Act of 1885.

These are copied in their entirety in the appendix to this brief. Art. XIV of the Constitution so far as pertinent is as follows:

"Section 1. The use of all water now appropriated, "or that may hereafter be appropriated, for sale, rental "or distribution, is hereby declared to be a public use, "and subject to the regulation and control of the State "in the manner to be prescribed by law."

"Section 2. The right to collect rates or compensation for the use of water supplied to any county, "city and county, or town, or the inhabitants thereof, "is a franchise and cannot be exercised except by authority of, and in the manner prescribed by law."

#### B.

**Further statement and analysis of the construction placed by the court below upon the provisions of Article XIV of the State Constitution and of the statutes involved, as prohibiting contracts with comment upon such construction, and its difficulties.**

For the present considering only the provisions of the Article XIV of the State Constitution and the legislation prior to the Act of 1897 amendatory of the Act of 1885, we inquire where is found the express or implied prohibition against contract relations between the owners of the dominant and servient estates, respecting what the Constitution terms "rates or compensation for the use of water supplied"?

No express prohibition is anywhere declared. If it exists, it must be inferred as necessarily implied in the Constitution and statutes.

**The Essence of the View held by the Court Below.**

In the effort to get a fair and full comprehension of the view of the court below, we quote further from its opinion; and first, the following: (76 Fed. R. 336, italics ours):

"Since to make good the appropriation, it is essential that the water be applied to some beneficial use, these provisions of the statute (of March 12, 1885,) of themselves necessarily pre-suppose, that, until the action of the Board of Supervisors is called into play, *the parties furnishing the water must designate the rates.* It cannot be furnished for nothing. The law does not exact that, nor has any consumer the right to expect it.<sup>1</sup> The statute evidently proceeds upon the theory that the rates charged by the person, company or corporation, may be satisfactory to the consumers,<sup>2</sup> in which event there would be no occasion for the intervention by the Board of Supervisors.<sup>3</sup> *Until that time the rates established and collected by the person, company or corporation furnishing the water prevail.* This, it seems to me, would be the true and obvious construction of the statute if it had not been so declared in terms. But the statute does so declare in terms, and in these words:

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(1) This is stated by the court evidently as a general proposition, and not as based on the facts of the case, which are that the rate of \$3.50 per acre per annum was the actual irrigation rate established and collected at the institution of the suit and for all the time prior thereto, during which the system had been in operation, i. e. over eight years.

(2) The record shows that the established rate of \$3.50 was satisfactory to the consumers.

(3) The statute nowhere provides that consumers *as such*, can call in the intervention of the Board of Supervisors. It is *inhabitants and tax-payers* who are competent petitioners to the Board.

“Until such rates shall be so established (namely, those first established by the Board), or after they shall have been abrogated by such Board of Supervisors as in this Act provided, *the actual rates established and collected*’ by each of the persons, companies, associations and corporations now furnishing or that shall hereafter furnish appropriated waters for such rental or distribution to the inhabitants of any of the counties of this State, shall be deemed and accepted as the legal rates thereof.’ Act. Cal. March 12, 1885, Sec. 5.”

In the passage above quoted from the opinion, the court held, as exemplified in the decree, that the foregoing extract from Sec. 5 of the Act of 1885, empowered the corporation in its discretion, to change the rate from \$3.50 per acre per annum to \$7.00 per acre per annum, against the will of the community of irrigators. The remaining portion of the opinion is devoted to the proposition that this hypothetical power of the corporation to change rates is of such nature that it cannot be abridged, limited, qualified or in any way controlled by the corporation’s own contracts.

We continue with the following quotation from the opinion, which in connection with the extracts above set out, present the rationale of the decision. The court went on to say (*Ibid* 337):

“The views above expressed are conclusive against the position of the defendants, unless it be, as claimed by them, that the complainant is estopped from making *any changes in the rates* at which it has heretofore furnished the defendants with water, or that the water is so far private property as that the parties to the

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(1) This was when the bill was filed \$3.50 per acre per annum.

"suit could make valid contracts in respect to the rates  
 "at which the company should furnish it to the de-  
 "fendants.

"If the company is a *private* corporation, and the  
 "water private property, this would undoubtedly be  
 "so; but if the complainant is a *public* or *quasi* public  
 "corporation, and the water in question is, and at all  
 "times mentioned has been, charged with a public use,  
 "it is not true; for nothing can be clearer than that, in  
 "respect to such water, *rates established in pursuance of*  
*"law must control, and that no attempt to ignore that*  
*"control, and to establish them by private contract is of*  
*"any validity. . . . (and *ibid* p. 338). As the water in*  
*"question from the moment the appropriation became*  
*"effective, became charged with a public use, it was*  
*"not in the power of either the corporation or of the*  
*"consumers to take away or abridge the power of the*  
*"state to fix and regulate the rates".*

"All persons are presumed to know the law, and  
 "those who bought lands from the complainant cor-  
 "poration upon its representations that water for irri-  
 "gation would be furnished at the annual rate of \$3.50  
 "an acre, or otherwise acted or contracted with ref-  
 "erence to such rates, must be held to have known  
 "that the Constitution, conferred upon the legislature  
 "the power, and made it its duty, to prescribe the man-  
 "ner in which such rates should be established. This  
 "the legislature has done by the Act of March 12,  
 "1885. As by that Act the legislature deemed it  
 "proper to allow the action of the Board of Supervis-  
 "ors to be invoked in the first instance only by 25 in-  
 "habitants, who are taxpayers, of the county, and  
 "until then to leave the designation of rates to the person,  
 "company, or corporation furnishing the water, to hold  
 "valid and binding any contract between parties with  
 "reference thereto would be, in effect, to ignore and set  
 "aside the provisions of the statute upon the subject; for  
 "it is plain that a contract must bind all parties to it, or  
 "it binds none; and, if binding at all, its manifest effect  
 "would be to remove from the regulation of the state the  
 "rates in question, and leave them to be governed and  
 "controlled by *private* contract, or such representations  
 "and acts as may amount to the same thing."

To get the full significance of this pregnant pronouncement, it must be borne in mind, that in the case in which it was made, it appeared that the Board of Supervisors had prescribed no rates and had never been called upon to act, yet the system had been in operation for eight years.

Also, that a uniform annual rate of \$3.50 per acre had been the only actual rate established and collected by the corporation, and was co-incident and identical with the alleged contract rate, and was satisfactory to the consumers.

Therefore, the question on the record was not between the alleged contract rate of \$3.50 an acre annually and some different rate limited by the Board of Supervisors—as to whether the one, or the other should prevail.

But the suit arose out of the fact that the company had given notice to the appellants that on January 1st, 1896, it would establish a rental of \$7.00 per acre per annum for water for irrigation and that from that day they would be required to pay that sum; and from the fact that the Receiver, after his appointment and before said date, gave a similar notice. (Bill trans. p. 11). This new rate the defendants refused to pay. The Receiver then shut off the water and brought this suit.

The question then actually before the court was, whether it was competent to set up the alleged con-

tract and actually established and collected rate of \$3.50 against this *ex-parte* \$7.00 rate so "designated" and demanded by the company and its Receiver; and for the Receiver to enforce the collection of the same by summarily shutting off the whole water supply.

It follows, that when the court said in its opinion, that "it was not in the power of either the corporation "making the appropriation, or of the consumers, to "make any contract or representation that would at all "take away or abridge *the power of the state to fix or "regulate the rates,*" it meant to say, and did say, that when the corporation gave the notice for the future \$7 .00 rate, and promulgated its future requirement to pay it, it acted as the vice-gerent of the state and wielded its sovereign power to fix anew and regulate the rates, and that its own contracts should not stand in the way of its exercise of such power.

Before the appointed date of January 1, 1896, however, (in fact Sept. 30, 1895, Tr. p. 8) the corporation had gone into the hands of Lanning, as Receiver, for the Circuit Court. Consequently, it was not in position to demand anything at the time set by it for requiring the new rate.

But the Receiver had given the similar notice before January 1, 1896, and he it was who shut off the water and by this suit sought to make *his* notice, requirement and proceedings effective.

So it actually was the Receiver of a United States Court, who in its view, was the State *pro hac vice* and exercised the State's sovereignty to fix anew and reg-

ulate anew the rates. Whether the theory was that he succeeded to this authority as incident to his possession of the assets of the corporation, is not explicitly stated; but seems to be assumed by the court. And it was held that the contract and established actual rate of his insolvent corporation should not stand in the way of his enforcing his requirement.

That this is the only construction the rulings and opinion will bear, is shown by the succeeding context.

The court says: "The Constitution conferred upon the Legislature the power and made it its duty to prescribe the manner in which such rates should be established. This the Legislature did by the Act of March 12, 1885. As by that Act the Legislature deemed it proper to allow the action of the Board of Supervisors to be invoked in the first instance, only by twenty-five inhabitants, who are tax-payers of the county, and until then to leave the designation of the rates to the person, company or corporation furnishing the water, to hold valid and binding any contract between the parties in reference thereto would be in effect to ignore and set aside the provisions of the statute upon the subject."

This passage we submit can bear no other meaning than that the designation of this \$7.00 rate by the company and its Receiver was the exercise of a statutory authority; that such authority stood on the same plane with the authority granted to the Board of Supervisors; and because it was of such character, it could not be abdicated by the company, nor limited or controlled by its own contracts.

The same thought is reiterated in the passage



of the opinion immediately following, speaking of contract between corporation and consumer.

"If binding at all, its manifest effect would be to *"remove from the regulation of the State the rates in question*, and leave them to be governed and controlled by private contract, or such representations *"and acts as amount to the same thing."*

The specific "rate in question" was none other than this \$7.00 proposed rate, and it was that which the court refers to as "the regulation of the state", and therefore above the reach or control of the corporation's own contract.

And finally that there may be no mistake of its meaning the court uses this language:

"No company or corporation charged with a public use can be estopped by any act or representations *"from performing the duties enjoined on it by law."*

What was this *duty enjoined on it by law* thus assumed to exist?

It was nothing else in this specific case, than the exercise of power by the corporation and its Receiver to establish the \$7.00 rate in contravention of the contracts for the \$3.50 rate; and what comes to the same thing; also in contravention of the fact that the \$3.50 rate and it alone was, and for eight years had been, the uniform actual rate established and collected.

This power thus asserted for the corporation and its Receiver, is the power of regulation; it is the power

of a political superior; and as said by Chief Justice Waite in the *Railroad Commission* cases 116 U. S. 307, 325: "*This power of regulation is a power of government.*"

Thus it is plain that inasmuch as the statute of 1862 granted to water companies the right "to *establish*, collect and receive rates, water rents or tolls"; and Sec. 552 of the Civil Code declares that perpetual easements vest "at such rates and terms as may be *established* by said corporation in pursuance of law"; and the Act of 1885 employs the phrase that until the law should have fixed maximum rates for the sale or rental of water furnished, the "actual rates *established* and collected by the corporation" should be "deemed and accepted to be the legally established rates"—the court considered that the Legislature had delegated to the corporation the *governmental* and sovereign authority not only to establish the original rate of \$3.50, but also to repeal the same and from time to time to enact and *establish* new rates. The idea was expressed in the argument of the learned counsel for the Receiver in his very able brief to the court below, as follows: "The rates fixed by the company are *changeable* "by it the same as by the Board of Supervisors."

Or, as was expressed by other counsel acting as *amicus curiae* in *San Diego Flume Company v. Souther et al.* <sup>96</sup> Fed. 90, 164, now pending on rehearing in the Circuit Court of Appeals for the Ninth Circuit, in his brief on such rehearing in seeking to uphold the doctrine of the opinion of Judge Ross in this case. "This power

"of fixing and establishing rates, by whomsoever exercised, whether by the *corporation itself* or by the "Board of Supervisor, is a legislative function."

Thus power of the State to regulate and control the corporations in charge of the public use, is to be made effective, by simply delegating that power to the corporations themselves.

And the term *quasi public*, which was invented to express the conception that the corporation was subject to law, has suffered a sea-change, to mean that the corporation is the law maker and superior to its contracts.

The outcome of the application of these principles and this construction of the State Constitution and statutes to the case was, that the Receiver of the Kansas corporation was sustained in doubling, against the will of appellants, the actual irrigation rates that had been established and collected for so many years, under the entire system outside of National City, and in depriving the appellants of their water supply to enforce payment of the increased rate; the appellants were enjoined from suing in the state courts or elsewhere to prevent the obstruction of their use of the water, or for the injuries sustained thereby; the court refused to hear their defenses—that their perpetual easements had been bought and paid for, or otherwise acquired under the voluntary offer of the company, and were free from incumbrances, except for payment of the annual rental rate of \$3.50 per acre per annum, as fixed either by express agreement with the company,

or by the long continued practice of the parties; and the court also declined to inquire whether the increase of rate was reasonable.

But we apprehend that the fact of the existence of irrigation easements as an institution of private property, is the key to the true meaning of the Constitution, when it uses the terms "sale" and "rental" and of the statutes when they speak of rates "established" by the corporation.

And we submit, upon considerations to be stated, that a construction of the provisions of the Constitution and statutes which led to these results, is erroneous.

But if not erroneous that these provisions themselves are in conflict with the National Constitution.

And in either case, that the Acts of the Receiver and the judgment of the court were an unconstitutional exercise of the power of the United States.

For if such easements are individual property (which we shall assume to be true) then it is not a reasonable construction, if any other more reasonable can be found, which imputes to the statute the intention to declare in one breath that such easements are perpetual, and in another to put them for so much as a single hour, at the mercy of the corporate owner of the servient estate, by arming the corporation with the high prerogative power, inalienable and uncon-

trollable by its contracts, to repeal existing rates and enact new rates for its own benefit and at its own pleasure, and enforce them by summarily suspending or destroying the enjoyment of the easement, as was done in this case.

It is no answer to say, as did the court below, that if the new rates thus fixed are not satisfactory to the owner of the irrigation easement, he is at liberty, provided he is an inhabitant and tax payer, to unite with 24 other such persons (if he can induce them to join) in a petition to the Board of Supervisors to establish the rates. For this begs the question and assumes that the corporation has the right to change the rate; which is the very proposition to be established.

Moreover, (passing by for the present the grave questions not directly arising upon the facts whether the Board can at any time increase or diminish the rates in force when the easement vested, in order to increase or diminish the net revenue of the corporation) it is evident that the power of the Board, in any event, is not retro-active, but prospective; it is not judicial; but it is to prescribe rates which shall be charged in the future; and that is a legislative act.

*Commission v Railway Co.* 167 U. S. 479, 499.

It gives no remedy against arrears of increase, or past accrued increases of rentals, or against forfeiture of the easement for non-payment of them. This is illustrated by the decree in the original case entered February 12, 1898, by which the defendants were "re

"quired to pay to the complainant \$7.00 per acre per annum for water furnished to their lands, as set forth in the bill of complaint herein, *from and after the first day of January, 1896*, until the fixing and establishing of such rates by the Board of Supervisors of San Diego County . . . . . as a condition upon which water shall be furnished them by the complainant, and that upon failure of said defendants or any of them to pay said rates the complainant . . . be and is hereby authorized to shut off the supply of water to such or any of said defendants who shall fail for five days to make such payment (folio 103.)

How short the shrift permitted to defendants, before shutting off the water, is apparent, when it is remembered, that the new rate was noticed to take effect Jan. 1, 1896, and that the bill was filed Jan. 6, 1896, and alleged that the water had already been shut off.

This then is a present and pertinent illustration, that in no view of the powers of the Board of Supervisors can they be made available to correct retro-actively any exactions by way of increase of rates, or to relieve past forfeiture enforced.

And not only is this so, but suppose by way of further illustration that such an ordinance had been passed and were attacked by the company in an action in the court below, to set it aside as unreasonable, and at the end of some years litigation, it should be set aside, then as this decree is drawn, the \$7.00 and all the increase would be enforceable for all the intervening time, with its reasonableness not only unadjudicated, but with defendants under an injunction not to bring any suit to procure its adjudication.

Nor, upon the court's own view, is it any answer for the corporation, or its Receiver, to argue in support of the correctness of this construction, that this sovereign power supposed to be delegated to the corporation is not unlimited, but must be exercised reasonably. For the court expunged from the answer all the allegations bearing upon the question of the reasonableness of this increase, such as among others, that the ownership of the easements had been paid for; that only one-half the capacity of the system was in use; that this, with the irrigation rate at \$3.50 would yield rentals to amount of \$27,000 per annum; that the expense of maintenance of the whole system and the operating it so far as in use, was not to exceed \$12,034.97 per annum; that the value of the whole system was not to exceed \$300,000; and the court declined to go into the question of such reasonableness in the following language (76 Fed. R. 319 at p. 336).

"Should the rates fixed by the Board designated by law for the purpose be so unreasonable as to justify the interposition of a court, any party aggrieved would have his remedy in the appropriate court, by which such unreasonable rates would be annulled, and the question again remitted to the body designated by law to establish them. But in no case would the court undertake to do so. *Reagan v. Trust Co.* 154 U. S. 420; *Railway Co. v. Wellman* 143 U. S. 339; *Santa Ana Water Co. v. Town of San Buena Ventura* 65 Fed. 323.

*Therefore, it is not for the court in the present case to go into the question of the reasonableness of the rates established by complainant, and which it seeks to enforce. If unreasonable, and the consumers are for that reason dissatisfied therewith, resort must first be had to*

*"the body designated by law to fix proper rates to-wit, the Board of Supervisors of San Diego County."*

It follows then from the judgment of the court, that not only was the corporation, and its Receiver, upheld in repealing the old and legislating in the new rate, but it and he were accorded the sole prerogative of deciding upon the reasonableness of it for an absolute period of time i. e., until an ordinance fixing rates is passed, and for an indefinite contingent time longer, in case a successful attack could be made upon such ordinance in the courts; and it was also upheld in executing its judgment by shutting off the water from whole communities, including three school districts made defendants, which it did before it resorted to the court.

A more extreme instance, under a government of laws and not of men, in which one party to a property relation, has been sustained in combining in itself the functions of legislature, court and executive in its own case, one would venture to think it hard to find.

It is true that if the court had undertaken to decide the question whether the attempted increase of rate to \$7.00 was *reasonable*, it would have been awkward for the theory asserted by it that the consumers could resort to the Board of Supervisors, if that rate was not satisfactory. For this would be virtually an appeal from the decree of the court to the Board, on the question of reasonableness of the specific rate; it would be a reversal of the more usual course, suggested indeed in the opinion, of application to the



proper court to test the reasonableness of the rates fixed by the Board. Or, if a decree of the court as to reasonableness, were to be treated as *res judicata*, the vocation of the Board would be gone. And the court would have established the rate instead of the Board and would have assumed functions more akin to legislative or administrative, or both combined than judicial. This difficulty the court seems to have found to be an insurperable objection to passing upon the question of the reasonableness of the \$7.00 rate made by its own receiver.

But on the other hand, if a court by its injunction ties up the defendants hand and foot, from resisting an increase of rate to which they never consented; which is double that to which they have assented; which under the facts alleged in the answer is unreasonable; and makes them submit to the deprivation of their easements unless they pay the increased rate; and at the same time refrains from investigation as to whether the rate is just and reasonable, all upon the theory that the corporation is not private but public, and that its raising of the rate is a purely public and governmental act, which must not be questioned or examined by the court—but only enforced—how can all this be reconciled with the conception of private property in a perpetual easement for irrigation? Under such a judgment it is not property; but a mere enjoyment upon the sufferance of the corporation—a bare license which can be terminated at any time by raising the rent to any amount in the discretion of

the corporation; for there can be no difference in the principle whether the annual rate is thus summarily raised to \$7.00 or to \$700 per acre. If the court cannot question the reasonableness of the one, it could not question the other. If it must enforce the one by upholding the forfeiture of the right, it must enforce such another in the same way.

Thus the court which was asked in this case to enforce the increased rate on the assumed premise that the company or its Receiver could make *any* increase against the will of the defendants, was confronted with an excruciating dilemma; it had either to try the question whether the increase was reasonable, or refuse to try it. If it did try it, the court would have established the rate and would thus have destroyed the supposed function of the Board of Supervisors, who could not be permitted to overrule the court's decision upon the reasonableness of the increase. But if it did not try the question, then the court must enforce this increased rate, even at the alternative of destroying the easements, without so much as an inquiry as to whether the increase was reasonable, and in full face of the fact that the Board could not relieve against the forfeiture.

The court chose the latter of the two alternatives and decreed accordingly.

An assumed premise which presenting such a dilemma, resulted in such a judgment, is worthy of re-examination in this court.

Nor is it any answer to say that if the defendants did not desire to be put in such a predicament, they should have anticipated the action of the company, or rather of its receiver, by resorting to the Board in advance of January 1, 1896, the time at which, according to the notice, the required increased rates were to take effect.

For (waiving the question whether the Board has any jurisdiction to deal with *vested* easements to create, or increase or diminish net-revenue to the company) it is not a reasonable construction which makes it the statutory design to give the corporation the power to pursue the irrigator with so destructive a weapon, and drive him to the Board.

If the statute says any one thing in clear and unmistakable terms, it is that the petition of not less than twenty-five inhabitants and tax payers (let it be observed not consumers as such) shall be *their voluntary* act; and not a compulsion of the corporation exerted vicariously upon existing consumers, who may, or may not be either inhabitants or tax payers. The statute has in terms denied to the corporation power or authority to *initiate* a proceeding before the Board to fix rates.

What is thus denied directly, should not be read into the statute as granted to the corporation indirectly in the form of so drastic and doubtful a power as the supposed one of increasing rates *ad libitum* to affect vested easements, and to enforce payment

summarily in advance of any adjudication of the rightfulness or reasonableness of the increase.

But there is a further fundamental and insurmountable objection to the sufficiency of the supposed remedy of resort to the Board to obtain redress against corporate changes of existing rates; that is the objection that the invoking of such remedy would be conditioned upon the consent of others than the individuals whose easements are affected. As such easements are individual property, so must the right to resort to a public tribunal for their protection, be individual and unconditioned upon consent of any other person whomsoever. It is unreasonable to construe the statutes to put so great a power in the hands of one party to a property relation and to hamper the other party by the necessity of obtaining the consent of twenty-four other inhabitants and taxpayers, if he has the like qualifications; and if as in case of the three school corporations defendants, there is lacking the qualification of being tax payers; or, if as in the case of a number of the defendants, they be not inhabitants, then to burden the party with the necessity of obtaining the consent of twenty-five qualified persons, before he can so much as apply to the Board.

Neither is this objection answered by the suggestion in the following language of the opinion (76 Fed. R. at p. 339):

"It will hardly be contended that the defendants, "by reason of any of the express contracts pleaded in

"defense to this suit, or of any contract growing out of the representations alleged to have been made by the company, would be estopped from applying to the Board of Supervisors of the county for establishment of rates."

It is a very grave question, whether any of the defendants can throw off their contracts on their election to apply to the Board to fix rates. The question does not arise on this record. And we do not stand in any way committed to the assertion that they can thus supersede their contracts; our impression is very strongly against the existence of any such power; but we reserve the right to examine the question on its merits when it shall arise in a proper case. Neither is the question whether existing consumers can apply to the Board, the converse of the question, whether the company can raise the rates; for the reason that there is a very great difference between one party to a property relation applying to a public tribunal, and the other party judging its own case.

But one clear assertion of opinion we can make, that any contract relating to the title to the easement and the consequences of such contract and title, and any contract so far as it relates to maximum net profits or returns to the corporation, is everywhere and at all times binding on both parties; and beyond interference by any form of public authority.

Nor is it any answer to say that because the Constitution declares that use of water appropriated to sale, rental or distribution is a *public use*, it must fol-

low that the whole matter is under government administration and that there can be no contract relations.

We inquire what is the "public use" of water declared by the Constitution? We do not essay a comprehensive definition. We can only seek to specify some things which it does and some things which it does not denote, pursuing the safe process of "inclusion and exclusion," in which phrase Justice Miller characterized the history of the common law, "moving from precedent unto precedent."

*And first.* This "public use" does *not* mean ownership of water or the works by which it is supplied, *by the organized public*, as e. g. the state, a city or an irrigation district. Either of these public corporations may own a water system and a water supply appurtenant thereto. It would, however, be strange supererogation for the Constitution to declare the use of water from such a politically owned water system, (for such the system would be in the strict sense) a "public use"; or to declare the power to collect rates or compensation from consumers for water furnished from such a system, a franchise; or, to provide for rates fixed contingently by a Board of Supervisors to yield net receipts or profits of not less than six per cent on the value of the works of such a public system. The public use involved in public ownership is therefore different from the "public use" referred to by the Constitution.

The whole round of constitutional and statutory principles and of the scheme of regulation and control, relate to water systems, in the language of Sec. 4 of the Act of 1885, "belonging to and possessed by each person, association, company, or corporation, whose franchise shall be so regulated and controlled."

Therefore these provisions of the Constitution and statutes do not pertain to water systems owned by the state or any political sub-division of the state. This obvious truth was pointed out as long ago as 1882, in *People v. Stephens* 62 Cal. 209, 237.

Neither does this "public use" imply the expropriation of the private owner of such water systems, and the vesting of such ownership in any political body. This upon constitutional principles cannot be done except upon "just compensation having been first made to, or paid into court for the owner." Art. 1. Sec. 14 of the State Const.

*Second.* Such "public use" is not inconsistent with the creation of private servitudes upon the water systems, annexed as perpetual easements to land in private ownership. Sec. 552 Civil Code. *Merrill v. Southside Irri. Co.* 112 Cal. 426.

*Third.* Artificial conduits are as capable of being subjected to irrigation servitudes as the streams on public lands. 21 Pac. Rep. 1028-1030.

In the following respects irrigation servitudes created upon artificial water systems and those cre-

ated on streams on public lands, are strictly analogous.

*a.* Both must be created by the owners of the servient estates i. e. by the acts, sufferance or grant of the owner, availed of by him who acquires the easement to his land. See Sec. 804 Civil Code, (Appendix).

Therefore "the appropriation" i. e. devotion by the corporation of water to "sale rental or distribution" of which the Constitution speaks, is an act of the same quality as the consent of the United States and of the state, to appropriation of the use of water from public lands, evidenced by the Acts of Congress recognizing and confirming water rights (Rev. Statutes Secs. 2339, 2340) and by the chapter of the Civil Code on water rights by appropriation (Appendix).

*b.* They are precisely alike in that when the owner of the servitude or his successor in interest ceases for five years to use it, the right to the servitude ceases as against another user.

They differ in that the grant or creation of the irrigation easement on the artificial system is generally by way of sale or rental i. e. for a consideration; while such servitudes upon the natural streams or sources of supply on public lands are the free gift of the government conditioned only on continued beneficial user. This difference is not an essential one; for the governments might have set prices upon these servitudes or burdens upon their lands, with exactly the same right and authority as when prices were set upon lands



thrown open to pre-emption, or other methods of disposition of lands of the United States, or on the school or swamp lands of the state.

The difference is that of the bounty of the government, but let it be noted, that the grant by it without exacting a price, is just as final and irrevocable, as though made for a price.

Should the government construct artificial water works, doubtless it would fix prices upon such ownership.

c. Until the government constructs irrigation works on its own lands, it grants only the strict servitude.

When it shall construct artificial works, it would add to this, the self-imposed obligation to manage, repair and operate, and would then in this respect be in the similar situation with private\* corporations whose corporate function it is to do this.

*Fourth.* Involved in what has already been stated, but of so great importance that it is worthy of separate statement, is the fact that whether in the case of artificial systems devoted to the sale, rental and distribution of water, or, in the case of sources of supply on government land open to appropriation, the use of the water is thrown open to the public to be used: *but the moment one of the public avails himself of the use, that use is withdrawn from the offer to the public, and the right to it becomes private property.* So that the power

either of the government or of the private corporation, to create or grant new easements is limited by those already vested; and when the capacity of the supply on the public land, or of the system of the private corporation is fully in use, the power to create further easements ceases altogether.

For as between appropriations on public land the first in time is first in right. Civil Code Sec. 1414; so in case of private corporations the perpetual easement, implies the exclusion of all after use that would encroach upon it, or impair it.

Therefore one feature of this "public use" is, so to speak, like the opportunity to acquire property at a public sale, *it is public in order that it may become private*.

It follows that principally and perhaps, exclusively, it is this *process of passing and testing* these irrigation easements in those who will use them, which the law can regulate.

Until there is a difference between the corporation which has made itself amenable to the duty of making the grants and him who would acquire the easement, there is absolutely no foundation for state interference.

If both agree—that is contract—interference by public authority is an impertinence and a mischief, or at least finds no warrant in the law as passed.

All these matters considered then, the inquiry remains, whether there is not a construction of the Constitution and statutes other than that adopted by the court, which is more in harmony with the existence of private property in irrigation easements, and which is not beset with so many difficulties.

We think there is such a construction; and that it is at the opposite pole from that adopted by the court, in that the former makes consent and consensual acts the essential element in the establishment of all the rates and compensation, here under consideration, instead of prohibiting them in the establishment of any, as does the latter construction.

V.

**Both branches of the ruling of the Circuit Court that there can be no contracts for the creation of water rights, nor any contract respecting water rates, are erroneous.**

**For given the institution of private property in water rights annexed to land in individual ownership, it follows implicitly that such easements are proper subjects of contract.**

1st. For their creation.

2nd. As to the terms upon which they are to be enjoyed.

This is so, under the terms of the Constitution, under the general law relating to the creation and enjoy-

ment of easements, and under the specific statutes involved.

1.

**The Constitution itself in terms recognizes and permits the appropriation of water to sale and to rental as well as to distribution. And a construction which would make the devotion of water to sale or to rental paralyze the power to make contracts to sell or rent, would make the constitution self-stultifying.**

The above proposition seems so self-evident, as to admit of as little argument as any other axiom. It was said in *Merrill v. Southside Irrigation Co.* 112 Cal. 426, 433:

"When water is designated, set apart and devoted "to purposes of sale, rental or distribution, it is *appropriated* to those uses, or *some of them*, and becomes "subject to the *public use* declared by the Constitution, "without reference to the mode of acquisition" (Italics those of opinion).

This exposition deserves careful attention. "Appropriation" to sale, rental or distribution, the court declares to mean simply *devotion to sale, or rental or distribution; or to one or more of those uses*. How can it be said that what the Constitution thus expressly contemplates, is forbidden? How is the antecedent capacity to sell, or rent or distribute which the Constitution assumes to exist, when it recognizes the voluntary power to devote water to such uses, destroyed by the very fact of its exercise? The notion is a mere phantasy.

The very fact of such voluntary devotion to some or all of the purposes of sale, rental or distribution to as many persons as the system can supply, but who are at the outset indeterminate and unascertained, makes the *use public*. This would be so even if the Constitution had not declared it.

It is this very business of sale, rental and distribution voluntarily undertaken by the corporation, which is subject to the regulation and control of the state. But the power to regulate and control such business is not the power to destroy either it, or the property rights by which it is carried on, or which become vested under it.

*Railroad Commissioner cases* 116 U. S. 307, 331.

The state does not own the business; it has not taken over the property; nor can it compel a single person to take water or to pay rates, who has not in some form by his own consent bound himself to do so. All it can do is to set reasonable limits to the corporation *within* which it may freely sell or rent easements.

It is proper here to notice that the proviso in Section 1 of Article XIV of the Constitution has no application outside of municipalities. Whatever there may be in that proviso for fixing hard and fast water rates, exclusively by municipal authority, has no application whatever in this case. That the Article was shaped by the constitutional convention *ex industria*, so as not to bring the irrigation and mining easements outside of municipalities within the operation of the

*proviso*, is conclusively shown by the debates and proceedings of the constitutional convention officially published. As appears in Vol. 3 p. 1371 of the official publication of the Debates and Proceedings, the proviso was introduced by Mr. Barber as an amendment to Sec. 1 as reported from the Committee of the Whole, and which was identical with the section as it now stands less the proviso. In his remarks in presenting the amendment, Mr. Barbour said

"As I understand it now, the provision and the amendment will contain *two* methods of regulation. "One where water is furnished in ditches, say for instance, for the use of a *mining community*, or for the use of an *agricultural community* under regulation by law; that is to say, by laws enacted by the Legislature, or possibly by the delegation of the authority to some local body. The other is for the regulation of the subject where it condemns the supply of water for *domestic uses* of the inhabitants of a *city* or *town* or some other *incorporated political* sub-division of the state, which has a body always able to exercise this control."

And at the next session of the convention, Vol: 3 *ibid* 1372, Mr. Barbour asked leave to correct the proviso which he had offered "so as to make it apply to incorporated cities and counties, and towns", by striking out the word "county" wherever it occurred in the proviso as introduced. As so corrected, it was adopted. It must be remembered that "city and county" is the technical term in California for the consolidated corporation uniting the functions of city and county, whose boundaries are co-terminal, of which the city and county of San Francisco is an example.

Upon the motion of Mr. Herrington <sup>in</sup> the Committee of the Whole to adopt Sec. 2 of Art. XIV of the Constitution as an amendment in the form as it was finally adopted by the convention and now stands, Mr. Reynolds said (*Ibid* Vol. 2, p. 1030).

"I will say . . . . . that it is an attempt to reduce in every possible manner, these corporations which undertake to furnish incorporated cities and towns with water, to the control of law, and to make them amenable to law, and make their operations conform to law and established rules. This amendment interferes not at all with the supply of water to miners, or to farmers for irrigating purposes."

The section having been re-read Mr. Reynolds further said (*Ibid* 1030):

"It interferes not at all with the mining or irrigation schemes, but has reference only to the supply of water to incorporated cities and towns. I hope the amendment will be adopted. We know what it means in San Francisco."

And so it was adopted.

While it is true that this Section 2 does apply throughout the state and not merely within municipalities, the foregoing extracts show that in the opinion of members of the convention the effect of both sections of Article XIV was to leave mining and irrigation interests outside of the rigid provisions adopted for cities and towns.

The Constitution establishes no scheme of absolute rates for the uses of water for mining and irrigation;

it leaves all control and regulation of the sale and rental for these uses to the Legislature.

So far then as the discussions of the convention throw any light upon the subject, it was not supposed that the status of mining and irrigating water rights was by either section of Art. XIV, revolutionized, so that they were no longer, as they always had been, perfectly capable of being the subjects of contract.

**The constitutional terms "sale," "rental" and "distribution," refer distinctly and appropriately to different methods of disposition of water.**

It is to be observed that the Article XIV itself in speaking of the *methods* of dealing with water, takes the distinction between "sale," "rental" and "distribution."

These three terms are not used pleonastically, but distinctively and appropriately. The debate in the convention above referred to, recognized important differences in the application of the regulating power under the Constitution, between mining and irrigation on the one hand, and purely city uses on the other.

When the Constitution was adopted, Sec. 552 of the Civil Code was in force, which declared the existence of the property institution of irrigation easements. This section, as above pointed out, is held by the Supreme Court of the State to consist with the Constitution. Therefore the Constitution itself embraces in



its comprehensive scope the subject of these easements, and we may look in it for fit descriptive words of the method for creating them and the manner of making recompense for grants of them when made by the corporation.

We find that the terms appropriate to the transfer and acquisition of easements, are the constitutional terms, "sale," and "rental"; while the term "distribute" is not appropriate. For no one would speak of *distributing* easements. The term "distribute" then must refer to the method of disposition of water otherwise than in the enjoyment of easements; that is it refers to the occasional, fluctuating and miscellaneous uses of water such as are common in, but not of necessity confined to, cities or towns. As to such uses formal contracts in advance of the use or otherwise are impracticable and unnecessary. There is therefore a solid reason for the marked distinction taken by the Constitution itself in the manner of applying the regulating and controlling power of the state in cities and towns from the method adopted outside.

These distinctions of method could not be maintained without recognizing contracts of sale and of rental, in dealing with the use of water. The distinction is barely adverted to, but still recognized by the Supreme Court in the case of *Merrill v. Southside Irrigation Co.* *supra* 112 Cal. 433, when it speaks of water appropriated to the purposes of sale, rental or distribution, *or some of them*.

It is to be noted also in connection with the fact that the Constitution preserves in Section 1 of Art. XIV,

the distinction between the sale and rental of water, that in Section 2 of the same Article it preserves the co-ordinated distinction between *compensation* and *rates*.

The term "*compensation*" has a well settled meaning in constitutional law. It occurs in the Declaration of Rights, Art. 1, Sec. 14, of the same Constitution, where it is provided that private property shall not be taken or damaged for public use without just *compensation* having been first made to or paid into court for the owner, etc.

There is no reason why the term compensation as used in Art XIV, does not cover the case of payment in gross or lump sum for a freehold irrigation easement. The use of the term certainly shows that the franchise of a water company is not confined to a scheme of annual rates, for enjoyment of the easement; but that it includes the taking of full payment for the title to it.

The term "*compensation*" as used in Sec. 2 of Art. XIV, is in fact the strict complement of the term "*sale*" as used in Sec. 1 of the same article; just as also the term "*rates*," as used in the Sec. 2 is the complement of the term "*rental*" as used in the former section.

But Sec. 2 of Art. XIV is much relied upon to support the theory of rigid and exclusive public regulation of rates and compensation.

The language of the section unquestionably does carry the *assertion* of the regulating and limiting power of law over the exercise of the right to collect rates and compensation for water supplied, to the extreme verge consistent with the "inalienable rights" of "acquiring, possessing and protecting property; and pursuing and obtaining safety and happiness" (Art. 1, Sec. 1, Const. Cal.); and with the guaranty against the taking or damaging of private property for public use without just compensation first being made; and the guarantees against the deprivation of liberty or property without due process of law; but the section can and must be construed consistently with these primordial rights.

Inasmuch as the power or regulation and limitation asserted in the Constitution, so far as it applies to this case, is to be exercised as *prescribed by law*, the practical and specific inquiry is whether there is any *law*, which prohibits contract relations.

By the term *law*, as used in this Section 2, we apprehend is comprehended not only the statute law, but the general system of law pertaining to the subject which is consistent with the statute. The statute is to be considered as supplemented by the general law under which the primary and inalienable rights declared by the Constitution have always, from the beginning of society, been exercised.

That general law always has embraced and always will embrace, so long as free institutions shall endure,

the great instrument of civilization for dealing with property rights—the instrument of contract.

It is next in order to consider the general law upon the creation of easements.

## 2.

**A Servitude and the corresponding Easement can be created in no other way than by contract, express or implied, between the owner of the dominant and servient estates.**

He who undertakes to establish that a perpetual easement in water supply for irrigation cannot be created in California upon the principles of contract, undertakes a task the like of which has thus far never been accomplished either under the common law or the civil law. We think the present case is the first in which any court has advanced the conception that such property rights cannot be dealt with by contract between the respective owners, of the servient and dominant estates; and we venture to think that the decision stands unsupported by any court of last resort.

There is no dissent anywhere from the principle tersely stated in the Civil Code of this state as follows:

*"Sec. 804. A servitude can be created only by one who has a vested estate in the servient tenement."*

Or as stated in 10 Am. & Eng. Enc. of Law p. 409, 2nd Ed.

"Easements as a species of incorporeal hereditaments 'lie in grant,' and can be acquired only by 'grant, express or implied, or by prescription, which 'pre-supposes a grant to have existed.'"

2 Wash. Real Property (Marg. page) 27, 3rd Ed.  
p. 277.

*Gould on Waters*, Sec 299.

*Goddard on Easements*, going somewhat more into analysis, says (Bennett's Ed. p. 87), that easements may be acquired:

"1. Under a grant; 2, by virtue of an act of parliament; 3. Under a devise; 4. By prescription; 5. Under a custom; theoretically, it is a question whether all these modes of acquisition are not identical, that is, whether the acquisition does not in each case take effect from a grant by the servient owner, either express or implied; and, in support of this theory it is to be remarked that Lord Cairns, L. J., in speaking of the power supposed by a railway company to have been given them by an act of parliament, to set out a foot-path over land they did not possess, said: (In *Rangely v. Midland Railway Co.*, L. R. 3 Ch. App. at 310, 37 L. J. Ch. 313) 'I will assume in the first place, that that is a correct expression, and that the object is to create what is properly termed an easement over the land; but assuming that to be so, it appears clear that to create an easement over land you must possess the ownership of the land. *Every easement has its origin in a grant express or implied. The person who can make that grant must be the owner of the land.* 'A railway company cannot grant an easement over the land of another person. They may grant an easement as soon as they become proprietors of the land, but not until they become such proprietors. 'They must own the servient tenement in order to give an easement over the servient tenement.' Even though, therefore a right of way or other easement were conferred under the provisions of an act of parliament, it is questionable whether it is not in the eye of the law created and given by an implied grant by the servient owner."

The discussion by Lord Cairns in the case above referred to, is relevant to the inquiry as to the genesis of the perpetual easements declared by Sec. 552. If an act of the Supreme Parliament did not suffice to confer upon the railway company the right of opening the footpath over land not owned by it, much less, in view of the limitations in our Constitutions, could an act of the Legislature by its unaided force take away an interest in the property of the corporation and confer it in form of a perpetual easement, upon the land owner.

There is then something more in Sec. 552, than a naked legislative fiat. We conceive that the true origin of the easements declared in it, lies in the consensual acts of the parties. What are they? There is, in this case, as already pointed out, first the appropriation, that is, as judicially interpreted (112 Cal. 433 *supra*), the devotion by the corporation of its water system, to sale, rental or distribution of water. Such a devotion is simply a public offer; when it is accepted by the land owner and the water has been applied to his land, a property relation has grown up, which is based on acts which are, and by the statute are treated, as evidence of mutual consent.

The law thereupon seizes upon what the parties have thus done, and declares that the easement may be perpetual, on condition, however, that proper compensation is made to the corporation. So that under Sec. 552 we still have the principle that the easement proceeds from the owner by his voluntary act ac-

cepted and utilized by the land owner, to which the statute imputes the effect of a grant. It is to be observed that the statute proceeds no further than to declare the perpetual easements based upon what the parties *are engaged* in doing, or *what they have done* by the way of furnishing and receiving water to irrigate land.

Of true grants of easements by statute, the acts of Congress and the laws of the States, relating to appropriation of water, are examples; but it is remembered that such grants are respectively servitudes upon the public lands of the United States and the States, and are therefore made by the owners. The grants of easements contemplated by Sec. 522 proceed then *not from the state*, but from the corporations *which own the systems*.

There is no possible mode by which such a servitude can be created upon private property and annexed to private property, but by the act or acquiescence of the owner of the water system, and the co-operation of the land owner.

*Thorn v. Sweeney* 12 Nev. 251, 256.

*McGregor v. Silver King Mining Co.* 14 Utah 47, 45 Pac. Rep. 1091, 1092.

The relation is therefore necessarily contractual.

There is then an obvious incongruity involved in the judicial admission, that each of these appellants

has acquired the right to the continuous use of water from this system "*as a perpetual easement to his land*", and as a right already vested, (76Fed. R. 334), and the decision, that all the allegations that such acquisitions were under contracts express or implied, must be expunged from the answer as irrelevant and impertinent. For if an easement must take its origin in an express or implied grant or in prescription, how can there be eliminated the element of contract or assent in its creation?

There are but two suggestions advanced in the opinion of the court below in support of its position that an irrigation servitude cannot be created by the contracts and the acts of the parties as alleged in the bill and answer.

The first is express, that inasmuch as the company could not have *compelled* the appellants to *buy* their easements, as a condition to being furnished with the water, therefore the parties could not freely and voluntarily make contracts with each other for the creation of such easements. The inconsequence of this conclusion, has already been referred to, and needs but to be stated.

The second suggestion is necessarily involved in the absolute and unqualified holding by the court, that no attempt to establish by private contract *rates* or *compensation* for furnishing water is of any validity.

Since any contract for the creation of an easement



would necessarily deal with the rates or compensation to be paid therefor, either by way of a lump sum, or annual rates, or both, the creation of the easement by contract would, if permitted, necessarily be inconsistent with the supposed exclusive "power of the State to fix and regulate the rates" to cover both net revenue and maintenance.

It is evident that if it is lawful for such a company to sell and for a land owner to buy, an allodial easement, the grant thereof on payment of the *full* agreed purchase price therefor, or waiver of any price, would *ipso facto*, forever eliminate from the relation between the servient and dominant owners, all rates to yield "net annual receipts and profits"; and would leave nothing to be met by the rates, but the "annual reasonable expenses" of repairs, management and operation.

So either the theory of the *exclusiveness* of the power of the State to fix and regulate rates and compensation must go; or, if it stays, the power to create easements by contract must go. Such an exclusive public power as that asserted by the court, will bear no rival near the throne.

It will not endure the suggestion that the power of the State to regulate may be only suppletory to the power of the parties to contract, and that it is useful only where they fail to agree.

The discussion therefore next addresses itself to the

question: whether the statutes do forbid any contracts express or implied relating to rates or rentals.

### 3.

**In contemplation of the statutes all actual rates for the enjoyment of irrigation easements are established upon the principles of contract; and they are not established by the water corporations acting as political superiors—nor is the Board of Supervisors empowered to fix absolute or minimum rates.**

The statute of March 12, 1885, is the law which defines the authority of the Board of Supervisors to fix and regulate irrigation and other rates outside of cities; the Board is not authorized or required to act except on a prescribed petition of not less than 25 inhabitants who are taxpayers (Sec. 3.) When it is so called upon to act, it can only fix *maximum* rates (Sec. 2); that is the Board is authorized only to announce a limit beyond which the company cannot go. Therefore an attempt by the Board to fix absolute and minimum rates, that is the actual rates, would be illegal. This was so stated in *Wheeler v. Northern Colo. Irrigating Co.* 17 Pac. R. 487, 492, under Sec. 8 of Art. XIV of the Constitution of Colorado, which makes it the duty of the general assembly to provide by law that the Boards of County Commissioners in their respective counties, shall have power, when application is made to them by either party interested, to establish reasonable maximum rates to be charged for the use of water, whether furnished by individuals or corporations.

Two things follow from the legislation :

*First:* That there is absolutely no limitation in the statute, even after the Board has acted, upon the power of the corporation to agree with any consumer for any rate *within* the maximum fixed by the Board. This Court in *Lake Shore & M. S. R. Co. v. Smith* 173 U.S. 684, 691, speaking of the exercise of the power to fix by statute maximum rates for railroad companies, said :

**" It is the power to declare a general law upon the subject of rates beyond which the company cannot go, but within which it is at liberty to conduct its work in such manner as may seem to it best suited for its prosperity and success."**

And where, when the Board acts, there is a pre-existing agreed rate, below the maximum fixed by the Board, that maximum does not disturb any such rate. The assumption that where the Board fixes a maximum higher than a rate previously agreed upon for an existing easement, this authorizes the corporation to increase the rate as against such easement to the maximum, would really and in effect, convert that into a minimum and absolute rate which the law intends to be only a maximum rate. This result is precisely what this decree would accomplish. It grants to the corporation and its receiver the demanded increase until the Board shall act; if the Board should, upon a lawful petition, fix a rate say of \$5.00, is it not apparent that if such rate can affect vested easements, it would prove the minimum and absolute rate—as certainly as that a corporation that wants to increase the \$3.50

rate to \$7.00 will exact a \$5.00 rate, if it can get no more?

The whole assumption that the function of public regulation is to supersede contracts, is based on the fallacy that rates when so established are absolute and hard-and-fast, instead of being a mere maximum limitation beyond which in contracting the consumer is not bound to go.

Only the parties interested can by their agreements express or tacit, fix an absolute and minimum or actual rate; for certainly that power is not given to any public body.

*Second.* The law by its terms, contemplates that irrigation water rights may vest under the system of any corporation subject to public regulation and control, before that power is exercised through the Board of Supervisors, and while *that method* of its exercise is in abeyance.

Now if the parties can make a contract for rates within the maximum, where that has been established by the Board, where is there any reason for saying that the parties can make no agreement, where the Board has established no maximum?

In the case here before the court the action of the Board of Supervisors had never been invoked, although the water system had been in operation over eight years, during which all of the admitted easements of the defendants had vested.

Reserving the act of 1897 for later consideration, we seek to bring together, in proper sequence, condensed, as it were, in codified form, the whole prior and co-existing statutory law, relating to establishment of rates for enjoyment of irrigation easements, in the case where the Board of Supervisors has not acted, as follows:

(1. From Act of 1862). Every company shall have power and the same is hereby granted to establish, collect and receive rates, water rents or tolls, which shall be subject to regulation by the Board of Supervisors of the county in which the work is situated.

(2. From Act of 1876 Sec. 552 Civil Code). Whenever any corporation has been or is furnishing water to irrigate lands, the right to the flow and use of said water is and shall remain a perpetual easement to the land, at such rates and terms as may be established by said corporation in pursuance of law.

(3. From Sec 5 of the Act of 1885). And until such rates shall be so established (i. e. by the Board), or after they shall have been abrogated by such Board of Supervisors as in this Act provided, *the actual rates established and collected by each of the . . . corporations now furnishing or that shall hereafter furnish appropriated water for sale or rental to the inhabitants of any of the counties of this state, shall be deemed and accepted as the legally established rate thereof.*

(4. From Sec. 8 of the Act of 1885). Any and all corporations, furnishing for sale or rental any appropriated waters to the inhabitants of any county or counties in the state . . shall so sell or rent . . such waters at rates *not exceeding* the established rates *as fixed and established by such corporation as provided in this Act*.

These provisions are all in *pari materia*, and so considered, their total and aggregate import is as follows :

The Act of 1862 grants to the corporation the substantive franchise to establish, collect and receive rates and water rents; the act of 1876 (Sec. 552 Civil Code) declares the perpetual irrigation easements *at* the rates and terms lawfully established by the corporation; the Act of 1885, Sec. 5, clothes the "*actual rates established and collected*" by the corporation with the binding obligation of express law, not only until the Board has fixed rates, but after such Board shall have abrogated, in the manner provided in the Act, the rates fixed by it in accordance with the Act.

And finally Sec. 8 of the Act of 1885 provides that the corporation *furnishing* the water for sale or rental, *shall* sell or rent at rates *not exceeding* the "*actual rates established and collected*" by it.

It seems to us that, while all these statutes aim at preserving to the corporations all proper freedom of action in their important functions of selling and renting the perpetual irrigation easements, and in originally establishing the compensation and rates therefor,

Such statutes carry on their face the plain evidence of constant progression, toward making the vested rights of the irrigator to the use of the water more permanent, and his duty in respect of rendering rates and compensation more certain and fixed, as against encroachment by the corporation.

In view of Section 2 of Article XIV of the Constitution, which provides that the franchise to collect rates (the grant of which franchise, it will be noticed, dates from the Act of 1862), "cannot be exercised except by authority of and in the manner prescribed by law," we must conclude that the legislation, as it is made to stand after the Constitution was adopted, should not omit to keep the corporation under regulation and control of law, merely because the Board of Supervisors has not acted. If the Constitution is obeyed, we are not to expect an interregnum of legal control and regulation of the sale and rental of water, while the power of the Board of Supervisors in that behalf has not been called into exercise. It would be quite possible and it would conform to the Constitution, for the statute itself in the interval, to shield the irrigator in his vested rights against all arbitrary action by the corporation; such for example as doubling the rates at one jump and summarily shutting off the enjoyment of the easements to enforce payment of the increase. The statutes might accomplish this by declaring that the right once vested to the flow and use of the water is and shall remain a perpetual easement to the land at a standard of rates adopted by the stat-

ute; that standard might be, with the utmost propriety, the actual rates which the parties directly interested have voluntarily established between themselves by their express and implied contracts, their usage and custom, and which have for a long time been uniformly paid by the irrigators and collected and received by the company.

When we turn to the statute, if we find that these very things are there provided with emphasis and comprehensiveness, we need not be surprised; for the statute would simply manifest in this instance for these property relations which free agents in pursuit of lawful and necessary ends have constituted for themselves that same high regard, the leading instance of which in our paramount law, is the prohibition of the Constitution against the passing by any state of laws impairing the obligation of contracts.

But the original bill in this case is framed upon the assumption, and the court below decided, that these statutes mean that the corporation, in the absence of any action by the Board of Supervisors fixing maximum rates, had not only the power to establish the original rate at which irrigation easements must vest, if at all; but also that the corporation had power to abrogate the rate at which the easements in this case did vest, which is also the actual rate established and collected by the corporation; and, to make and enforce a new and increased rate against the will of the irrigators; also, that the contracts and representations of



that corporation could be no bar to the exercise of this power.

The very *crux* in this case is over the question of *power* in the corporation or its Receiver to abrogate rates once established and to make and enforce increased rates against the will of the irrigators. So the complainant treated the case in his acts anteceding the suit, and in his bill, and in his exceptions to the answer and in argument.

So also the court below treated the case, as centering in the naked question of such power, without regard to consequences to complainant or defendants—for it felt constrained not to go into the question of the reasonableness of the increase, as we have already dwelt upon.

As a question of such power under the statutes we are now to consider it.

There are but two methods in which anything having the force of law between two or more persons can become, to use the strong word employed in these statutes, *established*:

The one, is by the voluntary agreement or consent of equals. The other is by the command of a political superior.

The Federal and State Constitutions themselves are examples of the former. The preamble of the Constitution of the United States declares this in the language:

"We, the people of the United States, in order to  
 "form a more perfect Union, establish justice. . . . do  
 "ordain and *establish* the Constitution of the United  
 "States of America."

And it was provided in Article VII that :

"The ratification of the conventions of nine states  
 "shall be sufficient for the establishment of this Con-  
 "stitution between the states so ratifying the same."

So the preamble of the Constitution of the State of  
 California reads :

"We, the people of the State of California. . . . do  
 "*establish* this Constitution."

And Section 7 of the schedule reads :

"Every citizen of the United States entitled by law  
 "to vote. . . . shall be entitled to vote for adoption or  
 "rejection of this Constitution."

Thus the Federal and State fundamental laws be-  
 came established upon the consent of political equals.

These are the highest examples of law coming into  
 force by agreement or consent, transcending of course  
 all others.

In another and important sense all lawful contracts  
 between civil equals become a law between the par-  
 ties, and the foundation of obligations which, under  
 the paramount law even constitutions and legislative  
 acts may not impair. So a treaty is a convention be-  
 tween political equals; but this does not prevent a  
 treaty made under authority of the United States from

taking rank in the supreme law of the land. Const. Art. VI.

And as we shall point out further on, in case of a water supply which affects so many individuals in such a way, that it rises to the importance of a public use, contracts and consensual acts lead to a *status* as to rates, recognized and adopted by the statute as the law, obligatory not only between the corporation and the immediate persons who have entered into these contracts and co-operated in such consensual acts with it *in the past*; but also as an obligatory maximum standard between the corporation and others who may desire to acquire irrigation easements in the future, so long as no other limitation is set by public authority.

On the other hand, a high example of that which becomes established by a Political Superior, is the Circuit Court itself which rendered this decree, under Sec. 1 of Article III of the Constitution, it being one of such courts "as the Congress may from time to time *establish*". So also are post offices and post roads, power to establish which is given to Congress in Art. 1 Sec. 8 of the Constitution, examples of this method of establishing.

And a humbler instance of the establishment by a Political Superior of that which has the force of law, is the fixing of maximum rates, under the power of the State to regulate and control the rates and com-

pensation of water, delegated to and exercised by the Board of Supervisors.

Of course the conception of laws enacted by legislative bodies of all kinds representing political superiors, is as common as possible.

A primary difference between an obligation amounting to a rule of conduct created by agreement or consent of equals; and the obligation created by a political superior is this:

The former cannot be lawfully amended or changed by one party to the agreement, nor except by the common consent. To pursue the illustration already employed, this was the conception maintained by Webster concerning the Constitution, which declares itself the Supreme law; and it proved of prevailing moral and material force.

But the obligation of a rule of conduct established by the Political Superior may be abrogated or superseded at any time at the will of such Superior.

Now in this case, we are to assume to begin with, as is conceded on all hands, that the annual rate of \$3.50 per acre was the original rate established by the corporation pursuant to law when the easements of all the defendants vested under Sec. 552; and that it became the "actual rate established and collected by the corporation" which under Sec. 5 of the Act of 1885, was to be deemed and accepted as the legally established rate. And if legally established, then it was mutually

obligatory upon the corporation and irrigators, until suspended by competent authority, with due saving of vested rights.

If that rate became established by agreement and consent between the corporation and irrigators acting on a plane of civil equality, one party could not revoke it and supersede it by a higher rate *in invitum* the others; for it is only a rule of action established by a Political Superior that can be revoked and superseded in the sovereign discretion of such Superior, whether the subject is willing or unwilling.

Hence the importance of the inquiry as to whether the \$3.50 rate was contractual or established by the corporation acting as a political superior.

For if the former be true and the latter be not true, the corporation had no power to abrogate the \$3.50 rate and supersede it by the \$7.00 rate, and the decree must be reversed.

Looking at the matter in the light of general principles, it is evident that the law does not compel men to organize water corporations; nor, the corporations to build their systems; nor, to devote them to the sale, or rental of water. Neither in the absence of action by the proper Board of Supervisors, do the statutes limit the rates which the corporations (in the terms of the above extract from the opinion) "must designate", or "charge" *at the outset* of their business.

Nor, on the other hand, do the *statutes*, however much necessity may, compel any person to become a user of water for irrigation, at any rates, or upon any terms.

Therefore at the opening of its system to the public use, where, as here, no limitation of maximum rates has been set by the Board, the corporation may designate rates or charges for furnishing water for irrigation, at its own discretion. But the action is altogether barren of results until one or more persons, finding the rate, to use the court's phrase, "satisfactory", accept the use of the water at the rates or charges designated; and in such case of those terms the acceptance must be, if the water is to be supplied; for there is nothing else to accept; and payment is the condition to the supply. Until such acceptance, the corporation is at perfect liberty to promulgate or designate new rates daily, if it choose; there is nothing *established*.

But at the moment when one or more persons accept the use of the water at the rates and terms designated, *then* there comes into existence a property relation—the perpetual easement to the land—at the rates and terms so accepted.

Then for the first time, is there a rate *established*.

We are told by the Receiver in his bill of complaint, that his corporation originally set the irrigation rates at \$3.50 per acre, per annum, and charged that rate and no more to January 1, 1896. Who will say that when the defendants accepted the use of the water at

that rate, and entered upon the long, arduous and costly work of making the desert to blossom by that use, such rate did not become *established* by the corporation in the sense in which that term is used in the Act of 1862, in Sec. 552 of the Civil Code and in the Act of 1885—Sections 5, 8, 10?

But how was it established? We see that the law did not compel either party into the relation of dominant and servient owners; they assumed this relation voluntarily. If it be claimed that they did not, it is incumbent for him who so claims to point out what act, on either side, did not have its root and origin in the free will of the parties, and why it was not mutual consent which effected the enduring relation of servient and dominant estates?

We here take occasion to point out that from the sum total of such acts, arise *reciprocal servitudes* upon *each* estate. For not only are the rights to the flow and use of water to irrigate the lands of appellants, servitudes upon the water system of the corporation; but the right of taking rents for this easement is a servitude upon the land to which the easement is annexed. Civil Code. Sec. 802. Sub.-div. 4 is as follows:

"The following land burdens, or servitudes upon land, may be granted and held though not attached to land."

"4. The right of taking rent or tolls."

The statute of 1862, Sec. 3 (appendix) uses the terms "rates," "water rents" and "tolls" in relation to the distribution of waters and navigation of canals.

Under the general statute, the demand as of right, and the payment as a duty, for more than eight years of this annual rate of \$3.50 per acre, without more, became a servitude of rent on the lands of appellants by prescription, even though there had been nothing more of express agreement than such acts of demand and payment; that in such case it would have become established by prescription, even without the aid of the Sec. 552 and the Act of 1885, and under Sec. 1007, Civil Code, and 318, Code of Civil Procedure (appendix), is fully supported by the case of *Whittenton Manuf. Co. v. Staples* 164 Mass. 319, 41 N. E. R. 441, 445-6.

That case, so far as this point was concerned, was a suit by the owner to collect one-fifth of the annual cost of maintaining a dam and drawing the water therefrom for the benefit of lower riparian premises, owned by another. The following extracts from the opinion will show the decision:

"No distinct agreement or stipulation being shown "calling for the payment of one-fifth of the cost of "maintaining the dam, we have to consider whether a "servitude has been imposed on the defendants' land "by prescription requiring such contribution \* \* \* \*  
"The one party collected the money as a right; the "other paid it as a duty."

Having shown that this continued for more than the length of time required to establish a prescription, in that State, the opinion continues:



"It would seem that the evidence is sufficient to establish such a servitude by prescription if in law such a servitude can be so created."

And after discussing authorities:

"So, where a reservoir dam is maintained for the benefit of several estates, the duty of repairs in whole, or in a specified proportion, may be established by prescription as a charge against one of the estates in interest. The duty of paying one-fifth of the reasonable compensation for drawing water rests on the same grounds."

But Sec. 552 in its specific declaration that the perpetual easements to the land irrigated is at such rates and terms as may be established, and Sec. 5 of the Act of 1885, that the actual rates established and collected shall be deemed and accepted as the legally established rates, virtually declare the servitude of rent within the meaning of Sec. 802 Sub.-div. 4 of the Code *supra*, to come into existence at once upon the concurrence of the acts of the parties defined in the section.

If these acts then by which such reciprocal servitudes were created were entirely voluntary, as is all but expressly admitted in the foregoing extract from the opinion of the court below, what is there in the opinion of the court to prove that both the servitudes, that of water, and that of rates, were not of consensual, and of mutually compensatory origin, but that they were the product of the fiat of law?

We have already commented on the fact that in order that such a rate may come into existence, there is

an absolute necessity not only that there be a corporation ready to furnish the water, but that there be land owners, either purchasers from the corporation or others ready to take it. At the opening of its system to use, the two must come together on some basis of compensation to be rendered to the corporation for the use of the water, and they must co-operate before there is any actual use of the water; and the user must pay the compensation before it can be collected; only then is there any actual rate established and collected.

The bill and answer in this case afford an excellent illustration of the history of communities in which just such an actual rate established and collected, came into existence—a typical instance—to every varied phase of which these statutes apply.

Here was a Kansas corporation which was both a land and water company, and which owned a large tract of arid lands well nigh worthless without irrigation; it planned an irrigation system with the primary object of making its lands salable as irrigated lands and with the more incidental purpose of getting additional revenue from the irrigation of other lands. Having built the system, and appropriated the only source of water supply for a considerable section of country, it came into control of a monopoly (the term is not used in any offensive, but purely descriptive sense) of the element by the use of which only, can the land be made tillable or habitable.

Before putting its lands on the market or throwing

its water system, which was completed in February, 1888, (Trans. 10) open to use, it considered in connection with that scheme, the question of the annual irrigation rates which it should charge, both to expected purchasers of its own lands and to owners of other lands. The Company knew, and must be considered to have known, all that could be known, about the cost of its system; it called into consultation, we are told by the bill (Trans. p. 10) its engineer, who gave it advice upon the probable "duty" and furnishing capacity of the system; and with all the information which it considered necessary, it did in the year 1887 set the irrigation rate of \$3.50 per acre, per annum, as the rate satisfactory to itself.

What course of action could be more natural or proper?

Contemporaneously, it put prices upon its lands as irrigated lands, ranging with the exception of half dozen five acre tracts to start with, from \$250 to \$500 per acre (Trans. p. 20) and advertised them for sale, representing that the water of its system was piped to and over its lands and would be supplied to purchasers thereof in abundance for irrigating the same at the rate of \$3.50 per acre, per annum. (Trans. p. 19.)

Up to this stage it will be observed the company acted with entire freedom and absence of restraint; it exercised the same actual volition in setting a rate upon its water, that it exercised in setting a price upon its lands as irrigated lands; and upon the same principle; indeed, it combined prices for the two in one.

In the absence of any maximum set by the Board it was supreme in the wilderness and desert which its system was later, with the co-operation of irrigators, to make fertile.

Presently, however, purchasers came for its lands, attracted by its representations, from every quarter of the Union, from Great Britain, Germany, Italy, Canada, Australia, New Zealand, Hawaii and elsewhere, and bought lands at these prices and accepted, and began using the water for irrigation at the \$3.50 annual acreage rate. Also owners of land not purchased of the company were, until December, 1892, invited to use and accepted and began using water at the same rate. These people could not know what the corporation knew about the basis of its rates. They could only know whether the rate was "satisfactory" and whether they were willing to buy and to improve land under those rates.

After December, 1892, the company adopted the policy of making express contracts for the sale of water rights both to purchasers of its own lands after that date, and to owners of other lands who began the use of water after that date, under the form of an express grant of one-acre foot per acre, each year, delivered on the land, for a specified lump price, first at \$50 and later at \$100 per acre (Trans. pp. 20, 21), and still subject to the same actual annual rate of \$3.50 per acre.

And a considerable number of the defendants bought water rights on these terms and entered upon the use of their easements paying the \$3.50 rate.

In June, 1895, the corporation established a rule of classification of lands to take effect January 1, 1896, (Trans. p. 24), for the purpose of fixing rates for irrigating acre property, and thereby distinguished lands to which the easement and flow of water for irrigation had been annexed by the consent or voluntary act of the company from lands to which it should not be annexed by such consent or voluntary act of the company, denominating the former as lands of the first, and the latter as lands of the second-class. And as to the second-class, it promulgated that in addition to the annual rate charged equally upon both classes, there should be paid upon lands of such second class an annual charge of 6 per centum upon the value of the irrigation easement to be taken at \$100 per acre.

All the lands of the defendants fall within the first-class, and there is not, and never has been, any question between the company and the defendants that they are in fact, and always have been on the same footing as to annual rates, and that they have been always so treated by the company.

There are no persons who would be classed as owners of lands of the second-class before the court.

All these defendants, whose lands were thus classi-

fied, paid the annual rate of \$3.50, and no other, up to January 1, 1896, within five days after which, and prior to, the time when any further rates could become delinquent under the rules adopted by the company (Trans. folio 50), this suit was brought.

Why was this rate not in its very nature and origin contractual, and for that very reason, the Board of Supervisors, having set no limits, the rate established by the corporation in pursuance of law, within the meaning of Section 552 of the Civil Code?

Suppose all this history had occurred in 1878, instead of from 1888 on, and therefore prior to the Constitution of 1879, and the act of 1885, what would be the answer of this question?

The answer must have been that the rate came about by the express or implied contracts of the parties, or the usage and custom followed by them. What other answer could be made?

But since the Sec. 552 has been held to be consistent with the Constitution, the answer must be the same now as it would have been then in the case supposed.

As already pointed out, this Sec. 552, covers every phase of the creation of these easements as shown in their history set forth in the answer and as summarized above, whether the corporation furnished the water to lands sold by it or to other lands. This section speaks of perpetual easements to the lands, at not only

such *rates*, but such *terms*, as may be established by the corporation.

The word "*terms*", as distinguished from "*rates*", is quite competent to cover the demand, or the dispensing with the demand, of a lump sum as the price of the easement, in connection with the annual rate. This word "*terms*" then in this section is a word of contract and covers the cases where the freehold easements were sold with the land and their price was included with the price of the land, whether under implied or express grants; where the easements were annexed without demand of any price to other non-company lands; and where it was annexed to still other such lands at the price of \$50 and later \$100 per acre. But the rate of \$3.50 was uniform, however the terms of sale, or annexation otherwise, of the easements varied. So that Sec. 552 covers every instance.

Now the "*terms*" at which these easements vested were contemporaneous and concomitant with the vesting; they were then set by the corporation and accepted by the irrigator; they became determined and perpetually fixed by the agreements, or acts of the parties at that time.

But the word "*rates*" is used in full conjunction with the word "*terms*" in the phrase "*at the rates and terms* which may be established by the corporation in pursuance of law". Since the language means at the *terms* established at the time of vesting, so it also means at the *rates* established at the same time; the maxim of

interpretation *noscitur a sociis*, applies. Therefore, under the facts in this case, each of these easements, in the emphatic language of the section, "*is and shall remain*" a perpetual easement to the land *at* the rates and terms established at the time when these easements vested, that is at the rate of \$3.50 per acre, per annum, and at the terms as to price then demanded or waived.

What meaning (as bearing on annual rates) is to be given to the phrase "*in pursuance of law*", as used in Sec. 552?

It meant but one thing when it was enacted—it means the same thing now; and that meaning was and is, that the corporation in respect of annual rates can never exceed the maximum established by law. As already pointed out, the Act of 1862 provided for regulation of rates by the Board of Supervisors; the Act of 1885 elaborates the law in this respect, confines the power to limiting maximums, and provides a method of procedure. But as before suggested, it also takes care that there is no *hiatus* in the legal regulation and control, simply because the Board has not acted. Were it otherwise it would not be obedient to Sec. 2 of the Article XIV.

It is apparent that the temptation to corporations, especially foreign, is strong, to increase water rates as against irrigators who, having confided in the promises and representations of the corporation respecting



the cost of water, have been induced to render themselves in house and field, dependent upon the supply.

One who is still free and unattached, and merely desires to share in the supply devoted to the public use, needs and receives, the aid of the law to obtain the use and to limit the rates within a maximum established by public authority (Act 1885, Sec. 10).

Much more ought those who have given hostages, in reliance upon rates and terms offered and accepted, for what the law assures them, shall remain perpetual easements, by investing, as in most cases, their all in a home under a water system, to be protected against any arbitrary advance in rates by the owner of the servient estate. Surely it is not to be supposed that the law is so defective as to have merely provided for a legally established maximum rate at the time of investment, but not afterward, except after the Board acts.

In addition to the considerations derived from Sec. 552, in favor of fixedness and permanency of the rate because it is contractual, we are now to consider what the Act of 1885 has provided in that behalf for the further peace and security of the irrigator against encroachment by the corporation.

Thus far everything done between the parties is entirely explainable upon the principles of contract; and unless by some over-ruling provisions of the Constitution and statute, it is made to appear that what

seems to have been done contractually, was in fact constituted by the corporation as the law-maker, we must conclude that the original rate of \$3.50 was contractual. This leads to the examination of the specific question whether what is <sup>en</sup>dominated by Sec. 5 of the statute of 1885 as "*the actual rate established and collected by the corporation*" is contractual, or established by the corporation as exercising governmental power, and therefore repealable by it in the continued exercise of the like power?

But before taking up that head we call attention to a number of cases in which contracts respecting water rights and rates between water corporations and irrigators have been enforced. While it is true in most of these cases, that the power to make such contracts was not directly in question, it is incredible that courts should have gone on year after year in an unconscious assumption that contracts were lawful, if, as is now claimed, they were in conflict with public policy.

*Fresno Canal & Irrigation Co. v. Rozell* 80 Cal. 114; *Same v. Dunbar* 80 Cal. 530; *San Diego Flume Co. v. Chase* 87 Cal. 561; *Clyne v. Benecia Water Co.* 100 Cal. 310; *Balfour v. Fresno C. & I. Co.* 109 Cal. 221; *Hewitt v. San Jacinto & P. v. Irr. Dist.* 56 Pac. Rep. 893 (April, 1899).

The comment upon some of these cases in *San Diego Flume Co. v. Souther* 90 Fed. Rep. 164, 168-9, we submit is reasonable and just. A re-hearing was

granted, however, in that case upon the very question here under discussion, and is now pending.

The cases which we are about to cite from Colorado are of special significance in view of the constitutional provisions in that state of which it is necessary to quote the following only, to illustrate what is now under discussion.

*Constitution Art XIV.*

"Sec. 5. The water of every natural stream, not heretofore appropriated, within the State of Colorado, *is hereby declared to be the property of the public*, and the same is hereby dedicated to the use of the people of the State, subject to appropriation as hereinafter provided.

"Sec. 8. The general assembly shall provide by law that the Board of County Commissioners, in their respective counties, shall have power, when application is made to them by either party interested, to establish reasonable maximum rates to be charged for the use of water, whether furnished by individuals or corporations."

While our Constitution contents itself with declaring that the use of water dedicated or devoted to sale, rental or distribution, is a *public use*, the Constitution of Colorado declares that the water of every natural stream (saving vested appropriations) *is the property of the public*, and dedicated to the use of the people. This declaration abolishes riparian rights and does not wait for any corporation, or individual, to devote water to sale rental or distribution, before declaring the public use, but declares all unappropriated waters *the property of the public*.

But has it been found necessary or possible for the courts of Colorado to declare that there can be no private property rights derived under such public ownership, nor any contract relations between water corporations and irrigators, but that the whole relation is absolutely dominated by public authority to the exclusion of every ordinary conception of private property rights, in water for irrigation, acquired under some form of contract? We think there is no suggestion of such a heresy in any reported decision.

The case of *Wheeler v. Irrigation Co.* 17 Pac. Rep. 487, 10 Colo. 582, is the first of the series which deal with the relations of water companies and consumers in that state under its Constitution. The court referred to this in the following language:

"The subject of water rights has always been justly regarded as one of the most important dealt with in the legislation and jurisprudence of Colorado. Hitherto attention has been mainly directed to the adjustment of priorities and differences between individual consumers; but hereafter owing to the rapid settlement of the eastern part of the state, the status of the carrier and its relations with the consumer, will command the most earnest and thoughtful consideration."

This case has already been referred to in connection with the highly necessary and proper doctrine that no water company can as a condition precedent to supplying water, compel an unwilling person to buy a water right. But the court did not conceive that this excluded the right to make voluntary contracts. It used this language (17 Pac. Rep. 493):

"But no expenditure, however vast, and no inconvenience, however great, can justify or legalize the exaction, *the consumer objecting*, of the demand under consideration, as an absolute condition precedent to use for the current irrigating season. I must not be understood as intimating the demand is illegal *per se* and if the consumer, prior to 1887, saw fit to waive his right, by voluntarily submitting thereto, both the legislature and courts may alike be powerless to relieve him from the legitimate results of his contract."

In *South Boulder & R. C. Ditch Co. v. Marfell* 25 Pac. 504, 506, it was said in the opinion of the court:

"Nor does the action of the commissioners in pursuance of the statute prevent consumers from making special contracts regarding the rate, or from continuing under agreements already existing."

In no subsequent case is anything held in conflict with this.

In *Wyatt v. Larimer & Weld Irr. Co.* 33 Pac. Rep. 144, cited in division III of this brief, it was said in the opinion at p. 147:

"The right to the relief demanded in this action is predicated upon, and must be determined by, the terms of the contracts entered into between the respective parties; and while these contractual rights are analogous to the rights guaranteed by the Constitution to appropriators of water, the action involves only the construction of private contracts between the ditch company and the plaintiffs, and no constitutional question is involved in the case.' . . .

"The rights of the respective parties are, therefore, to be measured and determined by the construction of the contracts in question; and the controversy, as above stated, involves only their contractual rights. The status of the defendant company, could in no re-

"spect affect these rights. Its duty to the plaintiffs "would be the same whether that duty was to furnish "water under their contract *as proprietor or carrier of "water."*

As pointed out in the earlier part of this brief, the contract of the corporation (*ibid* 145) was one "whereby it agreed perpetually during the irrigating seasons, to deliver water to the said parties"; and it was held that such contracts created freehold estates, which were entitled to protection against diminution by sale of later water rights in violation of the contracts.

And in *Larimer & Weld Irr. Co. v. Wyatt* 48 Pac. Rep. 528, 532, it was held that the contracts between the water corporations and consumers "provided for prorating water in times of scarcity and are binding between the parties"; and the contracts were otherwise enforced upon the principles laid down in *Wyatt v. Irrigation Co. supra*.

So in *Chicoso Irrigating Ditch Co. v. El Moro Ditch Co.* 50 Pac. Rep. 731, already cited, it was said of what was held to be a continuing easement that :

"The water was carried in a way recognized by our "statutes, obtained it is true by contract, but a right "which might have been acquired by legal proceeding."

See also *La Junta & Larimer Canal Co. v. Hess* 42 Pac. Rep. 50, 53; *Leadville Water Co. v. City of Leadville* 45 Pac. Rep. 362, 365.

*People v. Farmers' Highline Canal, etc., Co.* 54 Pac. Rep. 626 (1898), is a case which throws into strong relief the position that a contract between irrigators and a ditch company which was a *quasi* public corporation, to furnish water, is not opposed to the policy of the law which makes these corporations subject to public regulation and control. The court, after reviewing the cases in which it was held in that state that mandamus will lie to compel the delivery of water where there exists a correlative duty and right between a ditch company and irrigator, say (*ibid* 630):

"While the right recognized in these cases was one conferred by statute, which the relator upon the performance of certain conditions, was entitled to enjoy, we are unable to perceive any reason why the same right, when conferred by contract, is not equally susceptible of enforcement in this manner, when clearly established as in this case, and the consequence of its denial is the same."

It will be observed that this decision differs in *toto coclo* from that in the case at bar; for there the corporation was compelled by mandamus to keep its contract as a public duty; here the corporation is sustained in violating its contracts as a matter of public privilege.

From the State of Oregon we cite the following:

In *Nevada Ditch Co. v. Bennett* 45 Pac. Rep. 472, 482, the Supreme Court of Oregon per Wolverton J., speaking of a diversion and appropriation of water for actual use by others than the appropriator, said of such an appropriation:

"We are of the opinion, however, that it is the subject of contract between the person who initiates the appropriation, and the user. Nor is such a rule consistent or congenial with the creation and fostering of monopolies in the use of waters of public streams. The appropriator cannot withhold the water from a beneficial use. He must be diligent in making the diversion, or else he loses his inceptive right, and reasonably expeditious in making the application to a beneficial use, otherwise his appropriation will be measured by the quantity actually used; and he must not cease to use the water appropriated, upon pain of suffering an abandonment. And going with all this is the primordial condition that when not using he must suffer others to use."

Submitting these decisions we pass on to consider Secs. 5 and 8 of the Act of 1885.

#### 4.

**Until the Board of Supervisors fixes maximum rates, the statute itself fixes the standard of maximum rates, as being the "actual rates established and collected by the corporation," and forbids the corporation to exceed such maximum.**

The statutory provisions immediately bearing upon this subject, are contained in Sections 5 and 8 of the Act of 1885, and were stated in the early part of subheading 3, of the present division (5) of this brief.

It is of prime and decisive importance to gain a full comprehension of the legislative generalization embodied in the phrase employed in the section 5, to-wit: "*The Actual Rates Established and Collected*", based as it is and must be on existing and historical facts.



We are to observe how in this case this "actual rate established and collected", came into existence; to what permanent institution of property it relates; upon what basis of principle it rests—why it is given by the statute an enduring quality; and how it harmonizes with the individual property rights in the perpetual easements to which it is connate and complementary, and how it quadrates with the just rights of the corporation.

Also we are to inquire, whether the declaration that this rate shall be deemed and accepted as the legally established rate of the company, is not in itself the *control* and *regulation* of the franchise to collect rates and compensation, which the Constitution enjoins shall be prescribed by law, and a mandatory limitation upon the power of the corporation over rates.

As we understand the contention for the complainant to the original bill, and the decision of the court below, this statutory phrase was construed, and as so construed enforced, to mean at the most—and as fairly as we know how to state it—substantially this:

*"Such rates as shall from time to time be generally and uniformly demanded by the corporation."*

This construction precisely covers the demand for the \$7 rate per acre, per annum, to enforce collection of which, in the round-about way of enjoining the defendants from resisting by legal methods the shutting off of their water supply, the original suit was brought.

It will be observed that, if this construction be cor-

rect, it follows at once, that under Sec. 5 of the Act, every successive demand by the corporation of an increase of rate, provided only it is general and uniform, becomes immediately by virtue of the demand and that alone, what shall be deemed and accepted as the legally established rates thereof.

As such legally established rate did the court sustain and enforce by its decree, the increase of the rate from \$3.50 to \$7 per acre, per annum. This involved the repeal of the former legally established rate and the superseding of it by a new rate, double the old.

It is evident that to maintain this position, it was a vehement necessity to call in the doctrine that the corporation was the Political Superior of the irrigators; for only thus could the corporation repeal at its own pleasure *one* legally established rate, and assume to establish *another*.

Only on that theory could the Constitution be reversed so as to be made to confer upon the corporation the pleasing, but arduous, role of regulating and controlling the irrigators in the name of the State; for this, and not the regulation and control of the franchise of the corporation by law, is the net result of the construction placed by the decision in this case, on the provision of the Constitution which declares the public use subject to the regulation and control of the State.

But there are certain difficulties attending this construction, which makes the statutory entity viz: "The actual rate established and collected" mean "such rates as shall from time to time be generally and uniformly demanded by the corporation".

Contrasting the \$3.50 with the \$7.00 rate, there are to be marked the following points of difference between them.

1st. The former was *actual*, in the sense that it was practically lived up to by all the parties concerned when the bill was filed, and had been, for eight years previously; but the latter had never been actual, it never had been in practical operation.

To borrow the language of a learned Judge of the Superior Court of this County, in a judicial opinion:

"One of the ordinary meanings of the word 'actual' 'is 'existing at the time;' as for example, the actual 'situation of the country; the actual condition of the 'treasury; the actual state of the weather. It is used 'to express an existing state, situation, or condition ' of either person or thing. The actual rates are the 'existing rates established and collected by the company, which must be accepted as the legally established rates, until different rates have been fixed by 'the Board of Supervisors."

It is apparent that the \$3.50 rate filled this obviously correct definition; and that the demand for the \$7 rate did not.

2nd. The former rate was being collected and had been continuously collected for the whole period the

water system had been in operation, three years longer than the time necessary to establish the mutual servitudes of water and rent by prescription; and since collected, paid; and since paid, acquiesced in.

But the latter rate had never been collected. The whole burden of the original bill of complaint, is that the Receiver has not been able to collect the proposed rate, and fears he never will, unless the court aid him by its decree and injunction.

3rd. The former rate was established by the corporation in pursuance of law. The latter was never established by the corporation; it was in fact established by the judicial power exercised in the decree here appealed from. and not otherwise, nor until then.

The former rate was established by the mutual consent and co-operation, as we have shown, of the corporation and the whole community of irrigators; by contract and custom and usage for many years it became a fundamental term of the relation between the dominant and servient estates; it entered into the value of every tract of land; it was deemed and accepted as the legally established rate by all concerned. The latter was a pure edict of the corporation which it sought to force upon an unwilling community by the most drastic measures.

If the lexicographer be consulted to define the word *establish* he will give its meaning substantially as does the Century Dictionary to be :

"To make stable, firm or sure; appoint; ordain; settle or fix unalterably."

Surely the law has not committed to the corporation Alladin's lamp, so that a rub and a wish forthwith *establishes* the object of its desire.

We have already cited by way of illustration of the term, the establishment of constitutions by consent. We may borrow, without irreverence, a further illustration of the meaning of the word, often found in standard dictionaries:

"I will establish my covenant with him for an everlasting covenant. Gen. XVII-19."

There is no merit in the position that rates cannot become established by contract or consent. The method by which this \$3.50 rate became the legally established rate, was the declaration of the statute adopting as a rule of law a rate which had become actual between the corporation and the community, collected by the one and paid by the members of the other, pursuant to express or tacit agreements between them, or as in this case, by both express and tacit agreements. The statute adopted the usage, custom and practice which became established both by the express and tacit agreements for identically the one rate.

If we mistake not, we shall find that the Legislature of this State, in the enactment now under consideration, but followed the wise and statesman-like precedent of the Congress, when by the Act of 1866,

(Rev. Stat. Sec. 2339.) it provided that water rights which had vested and accrued, and which are recognized and acknowledged by the *local customs*, should be *maintained* and *protected*.

The facts in this case make an excellent illustration of the following passage from Austin's Jurisprudence by Campbell (Holt & Co. Edn.) p. 19:

"At its origin, a custom is a rule of conduct which the governed observe spontaneously, or not in pursuance of a law set by a political superior. *The custom* is transmuted into positive law when it is adopted as such, either *by being expressly embodied in statutes* promulgated by the sovereign authority, or implicitly by the decisions of the courts of justice which are enforced by the power of the state."

Force and effect must be given to the words "actual" and "collected" in the statute, as also to the word "established."

The words "actual," and "collected" and "established," as applied to the term "rate", take it beyond the mere promulgation, proposal or demand of a rate; these words imply the assent and co-operation of one or more persons who apply the water to land; thus, and thus only, can the rate become an actual demand which is collectible from any person or persons; when the rate has thus become actual and is habitually paid and collected, it becomes customary and established by usage; and the statute clothes this usage or custom with the express sanction of law. What is important to observe is that the usage or custom becomes the

law and that the law does not make the usage or custom. As Austin says, it is observed "spontaneously"; because no man can be compelled by law to use the water for irrigation and bring himself under the express or implied obligation to pay the rates; the obligation is voluntary, as much so as the devotion of the system by the company to sale, or rental of water, and its original setting of the rate was voluntary; and the mutual obligations are in fact contractual.

It is important to a true construction of the statute, to observe that it not only sanctions the rate which has thus become established and collected in actual practice as between the company and those who have acquired their easements at the rate *in the past*; but it declares that the same rate shall be deemed and accepted as the legally established rate in future cases of the creation of easements—that is as between the company and those who have not yet acquired, but only desire to acquire, easements to their land. (Act of 1885, Sec. 10.)

This suggests that the true field of the jurisdiction of the Board, so far as rates for net revenue are concerned, may be confined, to use the language of the Act of 1885, Sec. 6, to such appropriated waters as *are still subject* to such regulation by the Board; i. e. to cases where there is still remaining a supply of water not appropriated to prior easements and there is a dispute between those who desire to acquire new easements, and the company, over the justice or reasonableness of the actual rate established and collected

from the existing consumers; this view is strengthened by the fact that the petition to the Board for fixing rates is required to be signed by inhabitants and taxpayers and not by consumers as such; and by the leading consideration that vested interests in easements must be respected and that the burden of rates for their enjoyment cannot be increased *in invitum* to enhance the profits of the corporation. This question does not, however, arise directly upon the facts of this case, and reference to it is merely *in arguendo*.

But not only is this "actual rate established and collected" to "be deemed and accepted as the legally established rate thereof," i. e. of the corporation, *until* the Board fixes maximum rates; but the statute expressly declares, that *after* the Board has *abrogated* the rates it has established, which it may do "upon petition of such inhabitants, but not otherwise," (Sec. 6), the actual rate established and collected shall again "be deemed and accepted as the legally established rate."

This actual rate established and collected by this corporation for furnishing water, as it is shown upon this record, is then of such enduring virtue, that even after the Board of Supervisors has fixed maximum rates, such rate is only suspended as to any excess above the maximum( but whether only as to future and not as to vested easements, we do not now stop to inquire, since the question does not arise in this case).



And when the Board abrogates its maximum rates, this same "actual rate established and collected" by the corporation, revives in full force, and again "shall be deemed and accepted as the legally established rate thereof."

This "actual rate established and collected" by the corporation is then a fundamental entity—it becomes in the legislative conception, as it were, the common law of the water system, in supreme force as a limitation, when there is no special limitation of maximum rates, fixed by the Board of Supervisors; and only modified when there is such a special limitation in force; and surviving the special limitation after it is abrogated.

In every point of view the \$3.50 rate was actual; it was established; it was collected; but the \$7.00 rate was *not* actual; it was *not* established; it was *not* collected.

And the fundamental difference between them is that the former rate was the subject of the express and tacit consent, of contracts, some express and others implied, but contracts still; and the latter rate was not; but the corporation attempting to act as a Political Superior, sought to impose the latter as the rate by its sovereign command, *maugre* its every contract and representation.

The former rate came into existence by consent; it relates to a permanent institution of property; it rests

upon the principle of contract; it is in harmony with the individual property rights in easements; and since the corporation itself initiated the first step toward its establishment by setting it, it accords with all just rights of the corporation; and finally, it is the maximum rate which the statute itself in obedience to the Constitution adopted by way of the control and regulation of the franchise of the corporation to collect rates or compensation, inasmuch as the Board of Supervisors had not been called into action.

But the latter rate fulfills not one of these requirements, but assumes and asserts that until the Board acts, the corporation is under no control or regulation by the Constitution or laws, but is above the Constitution and the statute, and makes its own laws, and is free to break all its contracts.

4. But further considerations bearing upon this death-grapple between these two conflicting rates, arise out of the provisions of Section 8 of the Act of 1885.

The substance of this section, so far as applicable, is an explicit command to the corporation which *is furnishing* this water, that it shall so sell or rent such waters "*at rates not exceed ing the established rates . . . as fixed and established by such corporation as provided in this Act.*"

The appellants respectfully and earnestly submit, that this is a command to the corporation to continue

furnishing the water under the easements of the defendants, at the "actual rate established and collected by the corporation," which "shall be deemed and accepted as the legally established rates thereof" (Sec. 5): and that it is in fact a command to the corporation, to *accept* the \$3.50 rate, and to continue to furnish such water **at not to exceed** that rate; and that this was just as much so, after January 1, 1896, as it was for the eight years immediately preceding that date.

But the corporation refused to accept that rate, and to continue to furnish at not exceeding that rate.

It interpreted this statute to be a command to it, to *accept* and to *continue to furnish at rates not exceeding such rates as it should from time to time demand*; and since at this particular time its demand was \$7.00, that that was the rate it was commanded to accept.

In short, the statute—according to that construction—means that the corporation shall at no time take any higher rates than it wants at the time; that it shall always accept such rates as it wants, only so that it wants them from everybody; and that what the corporation wants shall as against the vested easements, have the force of law.

*In Interstate Commerce Commission v. Railway Co.* 167 U. S. 479, 505, this court used the following language:

"Could anything be more absurd than to ask a judgment of the court in a mandamus proceeding that the defendant comply with a certain order unless it elects not to do so?"

So here we make bold to say:

Could anything be more absurd than a construction which makes this mandatory statute mean, that the corporation shall not exceed the established rate of \$3.50 per acre, per annum—unless it elects to do so?

The two statutes—Section 552 of the Civil Code and the Act of 1885, Secs. 5 and 8—read together and applied to the facts of this case, do in terms declare, directly, specifically and emphatically, that the flow and use of the water which has been furnished to the land of each defendant, is and shall remain, a perpetual easement at the rate of \$3.50 per acre, per annum, as the actual rate established and collected by the corporation, which shall be deemed and accepted as the legally established rate thereof; and that the corporation shall continue to furnish the water at not to exceed that rate as so declared legally established.

But despite these statutes, it seems to be assumed in the opinion, that the law must contemplate that the corporation shall have the right, even as against vested easements, to change the rates established by its own initiation, at which such easements vested, and which the statute has adopted as the maximum, precisely *because* the statute denies to it the right to initiate any proceeding before the Board of Supervisors to change such actual rate established and collected; and *because* the statute confers this as an original right to be exercised only upon the petition of twenty-five inhabitants and taxpayers of the county (and perhaps then only as to future easements).

This position it seems to us is not more defensible than that one just considered, viz: that the statute only means to forbid the corporation at any given time to exceed the rates it then wants. For to sustain this position, it was not alone necessary to import, whence we know not, the strange doctrine that the corporation and the citizen can make no contract about a necessity of human existence; and its inseparable running mate—that other doctrine, to which Americans are all unaccustomed, that the corporation is the Political Superior of the citizen; but it was also necessary to contravene the plain purpose and intent of the statute. For the very purpose of the statute in the denial of the right to the corporation, is that it shall not even apply before the Board (where there could be a tribunal, notice, a hearing of all concerned and limitations set) to break in upon the maximum of the rates it has itself established at the outset, and of which it has secured the acceptance by the whole community of irrigators. Much less then do the statutes contemplate that it shall in its own arbitrary discretion break up the rates which it has itself made the basis of vested rights.

It is incredible that the statute should hedge about the power of the Board with the fundamental safeguards of a judicial proceeding, and yet contemplate, as a matter of mere construction, that the corporation may exercise a similar power without any limitations whatever as to *when, how, how often* and to *what extent* it may change the rates.

Under this head we submit then that the general scheme of the regulation and control of rates by the statute, is the fixing of maximum rates, and prohibiting the corporation from exceeding them.

That when the Board of Supervisors has acted, this maximum is to be looked for in its ordinance.

That where it has not acted this maximum is the "actual rates established and collected."

That it is undeniable that in the history of the San Diego Land & Town Company the \$3.50 rate did become the "actual rate established and collected."

That the statute expressly denied to the corporation the power to exceed it.

And that the Circuit Court is inherently without power to repeal such legally established rate and establish the new rate of \$7.00.

*Interstate Com. Commission v. Railway* 167 U. S. 479, 499, citing *Chicago, Milwaukee, etc., Railway v. Minnesota* 134 U. S. 418, 458; *Reagan v. Farmers' Loan & Trust Co.* 154 U. S. 362, 397; *St. Louis & San Francisco Railway v. Gill* 156 U. S. 649, 663; *Cincinnati, New Orleans, etc., Railway v. Interstate Com. Commission* 162 U. S. 184, 196; *Texas & Pac. Ry. v. Interstate Com. Commission* 162 U. S. 197, 216; *Munn v. Illinois* 94 U. S. 113, 114; *Peck vs. Chicago & Northwestern Railway* 94 U. S. 164, 178; *Express Cases* 117 U. S. 1, 29.

**THE ACT OF MARCH 2, 1897.**

But not only is the public policy to respect and maintain contract relations between corporations and irrigators declared by the Section 552 of the Civil Code and Sections 5 and 8 of the Act of 1885; but the legislature to provide, in terms that could not be mistaken, against the misconstruction of the former acts in respect of such policy, passed the Act approved March 2, 1897, inserting a new section in the Act of 1885; such Section is as follows:

Section 11 1-2. "Nothing in this Act contained shall be construed to prohibit or invalidate any contract already made, or which shall hereafter be made, by or with any of the . . . corporations described in section two of this Act, relating to the sale, rental or distribution of water, or to the sale or rental of easements and servitudes of the right to the flow and use of water; nor to prohibit or interfere with the vesting of rights under any such contract".

If this Act is valid, it settles, so far as the legislature is concerned, the question of public policy, on which the opinion of the court below turned, and clears away any doubt as to whether contracts for creating easements, and as to the rates upon which they may be enjoyed, may be made. The statute declares in substance, that such contracts are not opposed to the public policy of the State in the regulation and control of the sale and rental of water.

The act having been passed while this case was still

pending, and after September 14, 1896, the date of the opinion referred to in the decree, the court heard argument upon the effect of this act on the merits of the case, and rendered its opinion which is reported in *Lanning v. Osborne* 82 Fed. R. 575.

The court adhered to its former opinion hereinbefore quoted from, to the effect that:

"It was not within the power of either the corporation making the appropriation, or of the consumers, to make any contract or representation that would at all take away or abridge the power of the State to fix and regulate the rates".

And, on the subject of the statute of 1897, said (*Ibid* 577, 578):

"The amendment of March 2, 1897, has not been construed by the Supreme Court of the State, so far as I am advised. Whatever the reason for its enactment, or its real design, it is very certain, that this court has not the power to add to its language, nor the right, by construction, to import into its provisions a meaning not in consonance with the provisions of the constitution of the state."

"The amendment does not purport to provide any manner of fixing water rates, nor does it purport to make valid any contracts otherwise invalid. . . . If the contracts set up in the amended answer of the defendants were void in the absence of the statutory amendment of March 2, 1897, it is manifest that that amendment did not give validity to them. As already said, the amendment does not even purport to make valid any contract otherwise invalid, nor does it provide any manner of fixing water rates. . . . The invalidity of any and all contracts for the furnishing of water appropriated for sale, rental or distribution under any by virtue of the constitution and laws of



"California, other than *as prescribed by that constitution* and those laws, is, in my opinion, clearly and sufficiently demonstrated in the opinions heretofore rendered in this cause, to which reference has been made."

It is very true that this act does not proceed upon the assumption that "*any and all contracts for the furnishing of water appropriated for sale, rental or distribution*" entered into before its enactment, were invalid; and also that it does not assume to make valid, contracts that were before invalid.

What this act does do, and we submit ought by the court below to have been held to do, is, as already stated, to declare the legislative will that contracts relating to water supply shall not be considered to be against public policy, and that the former act of the legislature shall not be construed to prohibit or impair such contracts already made or to be made.

It does not weaken, but strengthens the force of the statute, that the legislature by this act clearly implies that, in its view, these contracts, under the constitution and the law, never were invalid; and that it fortifies them against the opposite view of the public policy of the state which the court in this case gathered by construction from the constitution and statute of 1885.

Now it is well settled that where parties make a contract otherwise fair and complete, and not *malum in se*, but which, when made, is contrary to a view of public policy, embodied in the statutes of the state;

and the legislature reverses this view by a subsequent act, which, by its terms applies to the pre-existing contract, removing the inhibition, such later act, neither impairs the obligation of the contract, nor deprives either party of property without due process of law, nor undertakes to make a contract where there was none before. And the contracts are to be enforced according to their terms.

*Gross v. United States Mortg. Co.* 108 U. S. 477, 488, 489.

*Ewell v. Daggs* 108 U. S. 143, 150, 151.

*Watson v. Mercer* 8 Peters 88.

*Satterlee v. Matthewson* 2 Peters 380.

*White Water Co. v. Valette* 21 How. 414, 425-6.

*Town of Danville v. Pace* 2 Gratt. 1, 11, 18.

*Foster et al v. Bank* 16 Mass. R. 245.

*Andretes v. Russell* 7 Blackf. (Ind.) 474, 475.

*Blackney v. Bank* 17 S. & R. 63, 65.

*Hess v. Werts* 4 S. & R. 356.

*Washburn v. Franklin* 35 Barb. 599, cited with approval in *Little Rock v. Bank* 98 U. S. 308, 314, 315.

*McMahon v. Bower* 39 Conn. 316.

*People v. Los Angeles Ry. Co.* 91 Cal. 338.

*Dentzel v. Waldie* 30 Cal. 138.

*Shaw v. R. R. Co.* 5 Gray 162, 179, 180.

Since the legislature may, by a change of its declaration of public policy, remove the bar of its former dec-

laration against the validity of a contract, so that courts are bound to follow the later declaration and uphold such contract, surely the courts are bound to follow the legislative declaration of a policy consistent with and in direct line with its prior legislation.

The Act of 1897 applies to the contracts express and implied set forth in the answer; it affirms them according to their true meaning and intent; it protects the vested rights under contracts whether relating to easements or rates; and the courts have no right to differ from the legislature on the subject, unless the State Constitution itself forbids such contracts.

What was meant by the clause from the opinion last cited, that "*the amendment does not provide any manner for fixing the rates*" is not clear. For since the amendment provides in substance that parties shall not be considered to have been or to be deprived of their right to contract respecting the sale, rental, or distribution of water, or respecting the sale of easements and servitudes of the flow and use of waters, why do these provisions not of necessity, embrace the consideration for a sale or rental, or in other words the rates or compensation? The manner of fixing the rates then which the Act declares shall not be prohibited or interfered with, is fixing them by contract.

And it is this which the court deems not to be in consonance with the State Constitution. (See language of its opinion above italicized). In effect the court

holds the Act of 1897 to be in conflict with Art. XIV of the Constitution.

We have given our views upon the proper construction of the Constitution upon this question, in subdivision 1 of division V of this brief. Anything further to be said in that behalf may conveniently be stated in division VII of our argument.

As before insisted this contract rate of \$3.50 per acre per annum is identically the same as the "actual rate established and collected" within the meaning of Section 5 of the Act of 1885; it is the contract rate which has by long practice grown into the rate *status* defined by the statute. The law of 1897 is in full harmony with the Act of 1885; and the corporation cannot lawfully exceed that rate because it is a contract rate; and, because the statute has adopted it as the maximum, and declared that it shall be deemed and accepted as the legally established rate; and that it shall not be exceeded.

## VI.

### STATE CONSTITUTION.

What we shall submit in subdivision VII of this brief with respect to the Fifth and Fourteenth Amendments applies to the Article I, Sec. 1 of the State Constitution. We refer to what is there submitted, to show that the true construction of Art. XIV must be in harmony with and not adverse to the right to contract respecting the use of water.

**The Conception enforced by the decree is in conflict with Article 20, Section 9, of the State Constitution, viz.:**

"Sec. 9. No perpetuities shall be allowed except "for eleemosynary purposes."

An essential feature of the construction of Art. XIV of the State Constitution, as enforced by the decree, is that it makes the interest of the corporation in its water system, inalienable and a perpetuity as against all users of the system.

The ordinary use of the term "perpetuity" is as applied to certain future interests in real or personal property, made subject to a condition precedent. Or, to quote the definition of Lewis on Perp. p. 164:

"A future limitation whether executory or by way "of remainder, and of either real or personal property, "which is not to vest until after the expiration of, or "which will not necessarily vest within the period fixed "and prescribed by law for estates and interests; and "which is not destructible by the persons for the time "being entitled to the property subject to the future "limitation, except with the concurrence of the individual interested under that limitation."

Such are the perpetuities contemplated by Sections 715, 716 of the Civil Code (Appendix):

"Mr. Justice Powell in *Scattergood v. Edge* 12 Mod. "278 distinguished perpetuities into two sorts, absolute and qualified, meaning thereby, as it is apprehended, a distinction between a plain, direct and palpable perpetuity, and the case where an estate is limited on a contingency, which might happen within a reasonable compass of time, but where the estate nevertheless from the nature of the limitation, might be kept out of commerce longer than was thought agreeable to the policy of the common law."

Randell Perp. 49, as quoted in Bouvier's Law Dic. under term "Perpetuity."

The following is quoted from 18 Am. & Eng. Enc. of Law 1 Edn. p. 381 note:

"Actual perpetuities. In many states there are constitutional prohibitions of perpetuities in the strict sense; with these, however, the Rule against Perpetuities has no connection."

It seems, however, that the view of Mr. Justice Powell is correct, and that a constitutional provision, like that of this state against perpetuities, covers both sorts of perpetuities, the absolute and actual, and the qualified, future, and contingent class.

Instruments conveying real or personal property, which undertake to create a plain, direct and palpable perpetuity, are disposed of by the common law doctrine re-enacted in our Civil Code, Sec. 711, which is as follows:

"Sec. 711. Conditions restraining alienation, when repugnant to the interest created, are void."

It was said in *Orley v. Lane* 35 New York 340, 346 in the opinion of the court:

"It is well settled that, at common law, a perpetual and total restriction upon the power of alienation of an estate in fee simple is void, as repugnant to the estate, and its failure does not affect the validity of the grant or devise. (Citing authorities)."

But in the case at bar the supposed restraint against alienation of freehold easements by the corporation is not contained in its title deeds to any part of its water

system, whether the title was derived in whole or in part under a Spanish grant, or under the Government of the United States or the State, by patent of land, or appropriation of water on public land or otherwise.

But the supposed restraint upon alienation of such easements is conceived to be imposed from without the chain of title, by the Constitution and statute of the State; for it is assumed that they have made this Kansas corporation and its successors in interest, perpetual absentee landlords of the irrigators, under the water system, at an equally perpetual rental, to produce a net revenue guaranteed by law.

In addition to the other constitutional grounds why the State cannot thus deprive the corporation of the right to sell and the irrigators of the right to buy and pay once for all for their easements in freehold, above dwelt upon, is the plain, direct, everlasting *No* of the State Constitution "*No* perpetuities shall be allowed."

The reason at the bottom of this constitutional provision which makes it applicable to the suspension of alienation by any limitation or condition, for a longer period than during the continuance of the lives of persons in being under our statute, is of more emphatic application where the restraint purports to be absolutely perpetual. 2 Blackstone p. 174 states this reason thus:

"Because by perpetuities (or the settlement of an interest, which shall go in the succession prescribed, without any powers of alienation) estates are made

"incapable of answering those ends of social commerce, and providing for the sudden contingencies of private life, for which property was at first established."

In the history of our own country, there is the memorable experience of converting the patroon estates of New York and the proprietary estates of Pennsylvania into freeholds. Great Britain is passing through a prolonged and severe experience in the effort to turn estates of absentee landlords into peasant proprietorships. Lecky's *Democracy & Liberty* Vol. 2 pp. 167-208.

It is not in the light of the warnings of history, for the people of California to fall back under this strange composite scheme which in one aspect seems to be an atavistic recrudescence of the old Spanish system of communal ownership of waters (See *Vernon Irrigation Co. vs. Los Angeles* 106 Cal. 237, 244, 248); but in another, shows the interjection of private corporations between the government and the irrigators, as the political superiors of the latter and endowed in the first instance with the powers of the government over the water supply, and those who are dependent upon it. This would make each corporation a sort of a little chartered East India Company, combining the functions of a corporation for profit with those of government; and it would exhibit the interesting spectacle of the sovereignty of the State over its waters on its travels, first vested in a Kansas corporation; next in the Receiver of a United States Court, residing in Massa-



chusetts; and next vested by him, pursuant to the sale of the property, in a Maine corporation; from which it would seem to follow that the sovereignty of this State is both peripatetic and a merchantable commodity.

But no such scheme of perpetual landlordism of the water supply, the provision of the State Constitution declares, shall be allowed; for a perpetuity, under the conception of the decree, it would be, of the most absolute and objectionable sort.

#### VII.

**If however the construction of the provisions of the State Constitution and Statutes as enforced by the rulings and Decree of the Circuit Court is correct then:**

**1st. Those provisions themselves are in conflict with the Constitution of the United States.**

**2nd. And whether such construction was erroneous, or not erroneous, the Acts of the Receiver, and the Judgment of the Court, were alike an unconstitutional exercise of the Power of the United States.**

The leading concepts enforced in the rulings and decree in this case, concerning Art. XIV of the State Constitution, and such statutes as the court below held to conform to it, have thus far been discussed with the view of ascertaining whether they correctly interpret the provisions of the State Constitution and statutes, in themselves considered.

Assuming now, that such interpretation is correct,

and that the settled policy of the State of California is, as the learned Circuit Court conceives it to be, it is proper to survey the general outline of the scheme, as so conceived, for the regulation and control of the relations between water corporations and irrigators, in order that it may be considered in its relation to fundamental principles.

Whether that conception is right or is wrong, the original decree is an actuality as to every defendant; and each defendant is entitled upon this record, to have applied to that conception and interpretation so enforced, the tests of the constitutional provisions invoked against it, in the answer to the original bill and in the bill of review, for the protection of his personal and property rights.

This scheme then involves:

1. That in California there can be no freehold or allodial ownership of irrigation easements and servitudes under the system of any water corporation; since the feature of rents to yield "net annual receipts and profits" on the value of the system, is made exclusive and perpetual; and as the statute now stands, this net annual income above all expenses of repairs, management and operation, is to be not less than six per cent, nor more than eighteen per cent on such value.
2. That when the corporation has constructed its system, its investment must remain locked up in the system so long as it endures; and the corporation must

be content with rates, to yield such net annual revenue as it can obtain within the minimum and maximum fixed by the statute.

3. That to effect these ends, any and all legal capacity of the corporation and land owners to make contracts relating to the water supply or rates or compensation therefor, is taken away; and, the whole control and regulation of the annual rates is by the State; that its power is delegated and committed first to the corporation itself, as representing the State; conditioned, however, that upon the presentation of a petition signed by twenty-five inhabitants and taxpayers of the county, the power of future regulation shall be exercised through and by the Board of Supervisors upon hearing had; but always within the minimum and maximum limits fixed by statute.

4. But that in no case has any irrigator any direct or autonomous voice, or volition in the matter, either as to terms for acquiring, or rates for the enjoyment of irrigation easements, whether at the outset of his use, or thereafter.

5. That so long as the Board of Supervisors has not fixed maximum rates, the irrigator has no recourse to the courts against any increase of rates by the corporation from the actual rates established by it at the time of the easement vested, and thereafter collected by it, nor any judicial remedy against the act of the corporation in shutting off the water to enforce payment of such increased rates.

In considering the subject, we are not unmindful of the rule that when the meaning of constitutional and statutory provisions upon a subject is clear, arguments *ab inconvenienti* are of little or no weight, either in the construction or administration of the law.

But we may also remember, that all the constitutional guarantees of fundamental rights are in a sense *contra inconvenientia*; they are safeguards against the practical consequences of abuses of the powers of government, tendencies to which history shows, and the constitutions assume, to be constant and recurring.

While the mere statement of the features of this remarkable scheme for the regulation and control of the waters of California is sufficient to point the constitutional argument, it is proper and necessary to notice the grave and practical consequences, present and potential, of this revolutionary and reactionary conception; for it has been enforced against the appellants and they present themselves here bound to it by the injunction and decree of the court.

The defendants were, somewhat sternly, told by the court in its opinion (76 Fed. R. p. 338) that:

"All persons are presumed to know the law, and those who bought lands from the complainant corporation upon its representations that water for irrigation would be furnished at the annual rate of \$3.50 an acre, or otherwise acted or contracted with reference to such rates, must be held to have known that the Constitution conferred upon the legislature the power, and made it its duty to prescribe the manner in which such rates should be established."

This scheme of regulation at once separates water companies and irrigators into hostile camps; it keeps their adverse interests at the maximum; and while neither can exist without the other, it forbids them to settle their relations by mutual agreement; but arms the corporation, as a political superior, with an arbitrary power over vested interests in the water supply and tenders to it, as the inducement to exercise such power, a sliding scale of net revenue ranging from 6 to 18 per cent.

It in turn would give to the inhabitants and taxpayers by way of defense to the aggressions which it encourages, the power to institute a proceeding before the Board of Supervisors, which is to result in future rates yielding not less than 6 and not more than 18 per cent net revenue per annum on the estimated value of the system for the time being; and for the better consoling of both parties points the way to the vista beyond, of indefinite litigation over the Board rates afterwards.

It ordains that irrigation communities shall labor under what is substantially an irredeemable interest bearing public debt, the estimates of the principals of which shall be open to be fought over before supervisors and courts each year, and from year to year, until exhaustion comes to one party or the other—but never to be settled by agreement; but not only the principal, but the rate of interest within the tremen-

ous range between six and eighteen per cent per annum is also thrown into this witches' caldron,

"For a charm of powerful trouble  
"Like a hell-broth boil and bubble."

This state of things is to be perpetual, because no corporation shall be permitted to realize upon its investment by sales of easements; no man shall be permitted to buy and pay for his easement; nay, if he has bought and paid for it, a stinging reminder of his unwisdom is added to the loss of his money.

The corporations are by the sheer force of the law, lifted up into Water Lords and the irrigator under this new Feudal system, is bound to a rent service forever, in the fixing of which he shall not have the voice of a freeman.

Is it any wonder that prosperity flees from communities blighted under a system which would reverse the maxim *interest reipublicae ut sit finis litium*; or, that the sales of lands by the corporation whose works are already constructed, have stopped; or, that work has ceased on the two greatest systems in Southern California now under construction, the Arrowhead in San Bernardino County and the Southern California Mountain Water Company in San Diego County, for the publicly stated reasons, that until contract relations are once more permitted they cannot venture to complete their systems and throw them open to the public?

But the unfortunate communities where the corporations already have their systems under operation and the people have already settled, are thus set by the ears and left to fight, with no hope of ever getting it fought out.

This system will demoralize the best men in corporations and make anarchists of the most law-abiding irrigators under their rule.

But to what end is all this? Because, we are told by the opinion, "to hold valid and binding any contract between parties with reference thereto (the rates) would be in effect to ignore and set aside the provisions of the statute upon the subject."

It seems to us that this approaches perilously near to the doctrine, that men are made for the government, and not the government for men.

For the exposition of this philosophy of popular government, we must go to the writings of La Salle and Marx and Bellamy, and not to Marshall or Kent or Story.

If, indeed, the malady of the State Constitution is so deep, that the declaratory act of 1897 is insufficient to cure it, then a last resort must be made to the stronger medicaments, and the more heroic surgery of the Constitution of the United States.

The provisions of the Constitution invoked are Sec. 1 of the Fourteenth Amendment:

"No State shall make or enforce a law which shall  
 "abridge the privileges or immunities of citizens of the  
 "United States; nor shall any States deprive any per-  
 "son of life, liberty, or property without due process  
 "of law, nor deny to any person within its jurisdiction  
 "the equal protection of the laws;"

Also the provision of Amendment V that no person  
 shall "be deprived of life, liberty or property without  
 "due process of law;"

And Art. IV, Sec. 4, that "the United States shall  
 "guarantee to every State in this Union a republican  
 "form of government."

This court in *Holden v. Hardy* 169 U. S. 366, 391,  
 considering the Fourteenth Amendment, said:

"As the possession of property, of which a person  
 "cannot be deprived, doubtless implies that such prop-  
 "erty may be acquired, it is safe to say that a State law  
 "which undertakes to deprive any class of persons of  
 "the general power to acquire property, would also  
 "be obnoxious to the same provision. Indeed, we  
 "may go a step farther, and say that, as property can  
 "only be legally acquired as between living persons  
 "by contract, a *general prohibition* against entering into  
 "contracts with respect to property, or having as their  
 "object the acquisition of property, would be equally  
 "invalid."

*Powell v. Pennsylvania* 127 U. S. 678, 684.

In *Allgeyer v. Louisiana* 165 U. S. 578, 589, it was  
 said:

"The liberty mentioned in that amendment means  
 "not only the right of the citizen to be free from the  
 "mere physical restraint of his person, as by incarcer-  
 "ation, but the term is deemed to embrace the right of



"the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary and essential to his carrying out to a successful conclusion the purposes above mentioned."

In the early case of *Van Horne v. Dorrance* 2 Dall. 304, 28 Fed. Cas. page 1012, 1016 (April, 1795) in speaking of the Constitution of Pennsylvania, then under consideration, it was said by Circuit Justice Patterson:

"The Constitution expressly declares, that the right of acquiring, possessing and protecting property is natural, inherent, and unalienable. It is a right not *ex gratia* from the legislature, but *ex debito* from the Constitution."

In the concurring opinion of Justices Bradley, Harlan and Woods, in *Butcher's Union Company v. Crescent City Co.* 111 U. S. 746, 764-5, after enumerating certain of "those fundamental privileges and immunities which belong essentially to the citizens of every free government," including the right of protection; the right to pursue and obtain happiness and safety; to institute and maintain actions of any kind in the courts of the State; and to take, hold and dispose of property, either real or personal, they are referred to as,

"These primordial and fundamental rights".

In the same case, *ibid* p. 756-7, in his concurring opinion, Mr. Justice Field said:

"As in our intercourse with our fellow-men certain principles of morality are assumed to exist, without which society would be impossible, so *certain inherent rights lie at the foundation of all action*, and upon a recognition of them alone can free institutions be maintained. These inherent rights have never been more happily expressed than in the Declaration of Independence, 'that new evangel of liberty to the people.' "We hold these truths to be self-evident—that is so plain that their truth is recognized upon their mere statement—that all men are endowed—not by edicts of emperors, or decrees of parliament, or acts of Congress, but 'by their Creator, with certain inalienable rights'—that is rights which cannot be bartered away, or taken away, except in punishment for crime—'and that among these are life, liberty and the pursuit of happiness, and to secure these'—not to grant them, but secure them—'governments are instituted among men, deriving their just powers from the consent of the governed.' "

To use the language of Justice Peckham in *Allgeyer v. Louisiana*, *supra*, at p. 590:

"It is true that these remarks were made in regard to questions of monopoly, but they well describe the rights which are covered by the word 'liberty' as contained in the Fourteenth amendment." And they apply here because this case involves both monopoly and deprivation of liberty.

The case of *Leep v. Railteay Co.* 58 Arkansas 407, 25 S. W. Rep. 75, was approved and followed in the case in the same court which was brought to this court in *St. Louis, Iron Mountain, etc., R. R. v. Paul* 173 U. S. 404.

The case involved the construction of a statute of

Arkansas, the provisions of which, so far as necessary, to show the application of the following extracts from the opinions of this court, and the State court, were in substance, that:

"Whenever any railroad company, corporation or persons engaged in operating or constructing any railroad or railroad bridge, or any contractor or subcontractor engaged in the construction of any such road or bridge, shall discharge with or without cause any servant or employee thereof, the unpaid wages of any such servant or employee, then earned at the contract rate, without abatement or deduction, shall be, and become due, and payable, on the day of such discharge."

This court affirmed the judgment and speaking of the decision of the State court in the former case as followed in the later, said, *inter alia*, *ibid*, 408:

"The general subject of the lawfulness of limitations on the right to contract were considered at length, with full citations of authority, in both these decisions."

And on page 406 this court said:

"The court conceded that the legislature could not, under the power to amend, *take from the corporations the right to contract, but adjudged that it could regulate that right by amendment, when demanded by the public interest, though not to such an extent as to render it ineffectual, or substantially impair the object of the incorporation.*"

And in tracing the line between valid and invalid legislation this court further said *ibid* 409:

"This act was purely prospective. It did not interfere with vested rights, or existing contracts, or de-

"*stroy or sensibly encroach upon, the right to contract*  
 "although it did impose a duty in reference to the pay-  
 "ment of wages actually earned, which restricted fu-  
 "ture contracts in the particular named."

From the opinion in the case of *Leep v. Railway*,  
*supra*, thus approved, we cite the following extracts  
 (25 S. W. 79):

"We have thus far spoken of the limitations that  
 "can be imposed on the right to contract. We have  
 "seen that the power of the legislature to do so is based  
 "in every case *on some condition and not on the absolute*  
 "*right to control*. We think it is obvious that the right  
 "to contract cannot be limited by arbitrary legislation  
 "which rests upon no reason upon which it can be de-  
 "fended; for, if it could, the right would cease to ex-  
 "ist, and become a license revokable at the will of the  
 "legislature, and *the government would become a despot-*  
 "*ism in theory, if not in fact*. Such a power cannot ex-  
 "ist, for, if it could, *it would be subversive of the right to*  
 "*enjoy and defend liberty, to acquire and possess property,*  
 "*and to pursue happiness*, declared to be inalienable by  
 "the Constitution of this State."

"When the subject of contract is purely and exclu-  
 "sively private, unaffected by any public interest or  
 "duty to person, to society, or government, and the  
 "parties are capable of contracting, there is no con-  
 "dition existing upon which the legislature can inter-  
 "fere for the *purpose of prohibiting the contract* or con-  
 "trolling the terms thereof."

And from *ibid* 25 S. W. Rep. p. 81.

"The legislature cannot regulate or restrain the  
 "right of individuals to contract by making it unlaw-  
 "ful for them to agree with each other that wages shall  
 "be paid at any specified time subsequent to the day on  
 "Which the labor by which they are earned shall be  
 "completed, or that the price of property sold shall be  
 "paid on a day subsequent to the sale. . . .

"But what is true of persons is not always true of corporations. Natural persons do not derive the right to contract from the legislature. Corporations do. . . .

And from page 83 *ibid*:

"It is obvious that the legislature cannot, under the power to amend, *take from the corporations the right to contract*; for it is essential to their existence. *It can regulate it when the interests of the public demand it, but not to such an extent as to render it ineffectual, or substantially impair the object of incorporation.*"

And from page 84 *ibid*:

"Tested by the principles of law we have indicated, the act under consideration is unconstitutional so far as it effects natural persons. As to corporations it is a valid statute. *It does not seriously impair their right to contract, but leaves them to contract with their employees on profitable terms.*"

If any more authority were needed to demonstrate that the right to make all just contracts concerning such a necessity as water for irrigation in California, exists, we may invoke the constitutional history of England and our own country—and the history of modern civilization.

We do not forget that we are not holding a brief for the corporation and that upon this occasion it is no part of our duty to maintain its rights further than they necessarily involve the rights of the defendants.

But it appears by the original bill (Trans. folio 12), "that no other person or corporation is or ever has been furnishing a supply of water to said defendants

" . . . . . nor is there now nor has there been any system of water works by which said defendants can be "furnished with water."

It also appears from the bill and answer that the corporation appropriated all the water of the Sweet-water river, which is the stream which naturally supplies the region along its banks and upon the adjoining mesas; in fact the corporation controls what is necessarily a monopoly of the water supply for this territory.

Under such circumstances an absolute and unconditional prohibition to the corporation to make contracts with the defendants relating to water rights or respecting compensation and rates therefor, is a similar prohibition to the defendants. Upon the hypothesis, though there were other corporations which could furnish water, contracts with any of them would likewise be interdicted. It is a fact of such public local notoriety that we may perhaps allude to it here, that with the exception of the reservoir and water rights held by an Irrigation District at Escondido, in this county, every reservoir site, stream and rivulet in this county is held and controlled by various corporations organized for profit. There is a growing tendency in the irrigating regions of the State to form water corporations on the mutual plan, that is, one in which the irrigators are the only stockholders who become owners of the stock in proportion to their water rights. An illustration of this form of organization is furnished in *McFadden v. County of Los Angeles*

74 Cal. 571. Such doctrines of State control as have found acceptance in this case, may well account for the hastening tendency to this form of organization.

But generally speaking, it is true that the control of the water supply of the State has gravitated to private corporations organized for profit. The tremendous significance of the sweeping and blasting doctrine that no land owner can acquire and protect irrigating servitudes upon any water system, annexed as easements to his land, by contract with such corporations; and that the corporations cannot dispose of the servitudes for an agreed price, or for an agreed sum and a stipulated annual rate afterward: that the joint effort of both irrigator and corporation cannot eliminate the element of annual net revenue upon the value of the easements from their relations, by sale and purchase, and payment and acquittance of the price for water rights—can hardly be fully appreciated by any one not intimately and widely acquainted with the environment.

For no corporation will construct new systems; but few—and those misled by their conception of civil liberty drawn from the native air—will buy land under the old systems; and all are anxious to get out from under the mere portent of doctrines so odious as that the irrigator can have no independent contractual voice about water rights or rates. Let any one imagine that the same socialistic doctrines were carried into the law as to mere land; and let him then remem-

ber that the water supply is the other and more costly half of tillable and habitable real estate in this region, and he can begin to conceive how utterly repugnant the concept is to every instinct of an enterprising, self-respecting, law-abiding, contract-keeping and Anglo-Saxon people.

This culprit conception, as instigating the original bill; as employed by the Receiver in shutting off the water supply (folio 15); as embraced in the orders and apprehended in the decree of the court, we here arraign in the name of the Constitution on the grounds:

*First.* In that it would deprive these appellants of their liberty of contract for their water rights and irrigation easements, without due process of law.

*Second.* In that it has deprived them of their vested property and contract rights in their irrigation easements without due process of law.

*Third.* In that it has deprived these appellants of the equal protection of the laws, by setting over them the corporation as their Political Superior, with arbitrary power to legislate into force new and increased water rates—to affect their vested rights—to impose on the appellants its own judgment as to their reasonableness; and to execute such judgment by the power of forfeiture—and at the same time denying to them the right to resort to any judicial tribunal.

*Fourth.* In that it has employed the power of the United States, acting by a Receiver of a court of the



United States and through the orders, decree and injunction of such court, in depriving the appellants of their liberty and property without due process of law in contravention of the Fifth Amendment to the Constitution.

*Fifth.* In that entering into the Constitution and frame work of the state government, it renders such government not republican in form; for that under that conception such Constitution denies, in the foregoing respects, to its citizens the right to contract or to acquire property; or to free the same of debt; and binds them to the corporation as a Political Superior in a perpetual rent service in the rating of which they have no voice.

The orders and decree of the Circuit Court constitute the primary subject of the bill of review; all else relating to the acts and claims of the corporation and its Receiver, are drawn before the court in the train and viewed through the media of the orders and decree of the court.

As already pointed out (subdiv. II of this brief) the practice of the High Court of Chancery made it among the functions of such a bill filed on the ground of error, to bring the original proceedings and decree before the same court for re-examination, as to whether they are contrary to some statutory enactment, or some principle of law or equity, recognized and acknowledged, or settled by decision.

Such a bill is so far privileged that it may be brought without leave of the court previously given. Mitford's & Tyler's Pl. & Pr. in Equity. 1 Ed. 181.

If in England a decree may be thus made the specific subject of examination as to whether it is contrary to an act of Parliament, it must be true that a decree may be here examined as to whether it conflicts with any provision of the Constitution.

It was held in *Chicago, Burlington & Quincy Railroad Company v. Chicago* 166 U. S. 226, 233:

"But it must be observed that the prohibitions of 'the (Fourteenth) amendment refer to all the instrumentalities of the State, to its legislative, executive and judicial authorities, and therefore, whoever by 'virtue of public position under a State government 'deprives another of any right protected by that 'amendment against deprivation by the State 'violates the constitutional inhibition; and as he acts in 'the name and for the State, and is clothed with the 'State's power, his act is that of the State.' This 'must be so or as we have often said, the constitutional prohibition has no meaning, and 'the State has 'clothed one of its agents with power to annul or 'evade it.' *Ex parte Virginia* 100 U. S. 339, 346, 347; *Neal v. Delaware* 103 U. S. 370; *Lick Wo. v. Hopkins* 118 U. S. 356; *Gibson v. Mississippi* 162 U. S. 565. These principles were enforced in the recent 'case of *Scott v. McNeal* 154 U. S. 34, in which it was 'held that the prohibitions of the Fourteenth Amendment extended to 'all acts of the State, whether 'through its legislative, its executive or its judicial 'authorities.' "

Now, in the case at bar, the Federal Court was administering the Constitution and laws of the State.

Its decisions construing the State Constitution and laws have no more or greater immunity from the Fourteenth Amendment than a similar decision by the State Court. If the constitutionality of a like decision by the State Court, when drawn in question and put in issue under the Fourteenth Amendment in the courts of the State, would have supported a writ of error from this court, both as to the appellate jurisdiction and the merits, then the issue joined by the demurrer to the bill of review which assigns error in the proceedings and decree under the same amendment, supports this appeal both upon the jurisdiction and the merits.

But this is not all. The provision in the Fifth Amendment of the Constitution that no person shall be deprived of life, liberty or property, without due process of law, is the cognate of the like provision in the Fourteenth Amendment; the Fifth Article is addressed to the United States;

*Speis v. Illinois* 123 U. S. 131; *In re Sawyer* 124 U. S. 200, 219; *McElvane v. Brooks* 142 U. S. 155, 158; the Fourteenth, to the states. The former amendment extends to all acts of the United States, whether through its legislative, its executive or its judicial authorities, just as the later amendment extends to the acts of all the departments of the states.

Therefore, if the force and effect of the rulings and decree of the Circuit Court is to infringe upon the constitutional prohibitions contained in either the

Fifth or the Fourteenth amendments, that is a substantive and independent ground here, both of jurisdiction and for relief.

That they do so contravene the provisions of the Constitution, we respectfully submit, has been fully pointed out.

The State Court has not expressly decided the questions ruled upon by the Circuit Court. While this court has therefore power and jurisdiction to revise the construction placed by the Circuit Court upon the State Constitution and statutes, yet, if it finds, as we argue, that it was erroneous, still the decree of the court below is itself a specific subject and entity before the court to be tried on constitutional grounds, as well as upon other grounds of error alleged in the bill of review.

Hence, whether the construction placed by the Circuit Court on the State Constitution and laws was erroneous, or not erroneous, its decree is still an unconstitutional exercise of the power of the United States.

Again, since the Constitution commands the United States to guarantee to each State a republican form of government, this command extends to every department of the Federal Government. The judiciary is not to assist the State authorities in establishing a dogma of government under which no person can in California buy an irrigation water right from a corporation, nor contract with it in any form for the terms

and rates upon which such property may be enjoyed; but under which essential and tyrannical powers of government, are avowedly as such, transferred to mere private corporations.

If this thing can be done with respect to the water supplies of California, it can be done with respect to the lands. And if it can be done with either, then the doctrines of Henry George are already justified; and the declaration of the Constitution, that the United States shall guarantee to each state a republican form of government, which an eloquent statesman characterized as "The sleeping giant of the Constitution" is like the beguiled and betrayed wizard, Merlin,

"Lost to life and use, and name and fame."

We most respectfully submit that this conception has under Article 4, Section 4, no constitutional place in the form and framework of the government of this State.

And that on the whole, the Fifth and Fourteenth amendments and Article 4, Sec. 4 of the Constitution make this conception of the policy of this State as enforced and applied by the order and decree of the court, void, and the decree erroneous.

## VIII.

**The Original Bill States no Cause of Action.**

**Application of the foregoing discussion to the original bill shows that it not only states no cause of action; but shows affirmatively that there is none.**

One of the grounds for sustaining the bill of review of a decree *pro confesso* is, that the decree is not sustained by the allegations of the original bill. (See cases cited in division II of this brief, at p. 88).

We respectfully submit that not only does the bill fail to state a cause of action, but that it affirmatively shows that there was and is none.

## A.

For in the first place, it shows, that the rate of \$3.50 per acre, per annum, is the only "actual rate established and collected by the corporation"; that rate therefore, is to be "deemed and accepted as the legally established rate thereof" (Act 1885, Sec. 5); and since the bill shows that the corporation was *furnishing water* to the defendants for irrigation (folios 10, 12) at that rate, this case falls literally and specifically within the provision of Sec. 8 of the Act of 1885, which lays its command upon the corporation to furnish waters at rates *not exceeding* such legally established rate.

Therefore the affirmative allegations of the bill show

that the decree is against the very terms of the statute law.

**B.**

In the second place, apart from the statute law, the bill shows that the increase of rates, was in violation of the agreement, whether express, or tacit and implied, between the corporation and the defendants, at which the easements of the latter vested. For the original bill shows that the corporation fixed the irrigation rate at \$3.50 per acre, per annum (folio 13); and that at the rate so fixed by it, "each of said defendants has by purchase, or otherwise, become the owner of a water right to a part of the water appropriated and stored by said company, necessary to irrigate his tract of land" (folio 10). This \$3.50 rate then, upon principles of contract must, in the language of the bill (folio 10), be the "yearly rental such as said company is entitled to charge and collect."

So the allegations of the bill here again show affirmatively that the decree is erroneous.

**C.**

In the third place, and bearing in mind the ownership of their water rights by defendants, acquired through purchase or otherwise, what is the supposed equitable ground upon which the bill claims for the corporation the right to supersede the \$3.50 annual rate per acre by another twice as large? It is set forth in folios 12, 13 and 14, and is in substance: that in 1887, when the corporation was about to commence

furnishing water, and to fix and establish rates, including the rate for irrigation, it was informed by its engineer that its system and water supply would furnish sufficient water to irrigate 20,000 acres of land and in addition thereto the necessary water for domestic use inside and outside of National City; that the company was then unfamiliar with the cost of operating and maintaining a plant and system of the kind; that relying on such report and estimate of its engineer, as to the probable duty of its reservoir and the capacity of its system, and believing that by fixing and charging an annual rate of \$3.50 per acre for irrigation, it could meet its operating expenses and pay itself some interest on its investment, *it fixed and established*, and has since charged such rate of \$3.50 per acre, per annum, and no more, until January 1, 1896; but that experience has demonstrated that the system, instead of coming up to the engineer's estimate, will not supply water sufficient to irrigate more than 7,000 acres, together with water demanded for domestic use; that the rate of \$3.50 per acre, if the whole capacity of the plant were in use, is not sufficient to pay operating expenses and maintain its plant and system; and that in order to pay the cost of operating and maintaining the plant, and pay said company a reasonable interest on its investment in it, or a reasonable sum for its services in supplying water to the defendants and other consumers, it will be necessary for it to charge a rate per acre per annum of not less than \$7.00 for irrigation.



But the bill on its face shows (Trans. p. 9, folios 11, 12) that the aggregate amount of receipts from the system for the year ending January 1, 1896, was \$25,715.00; from the allegation that the proposed increase of rate of \$3.50 per acre, with the amount of land now under irrigation, the additional revenue would amount to not less than \$14,000 per annum, (folio 16), there is to be inferred that such amount now under irrigation is 4,000 acres; the total capacity is alleged to be 7,000 or at least 6,000 acres, together with the water demanded for domestic use (folio 13); therefore the bill shows that only from four-sevenths to two-thirds of the capacity of the system is in use.

The bill further shows that rejecting from the total alleged annual expense of keeping the system in operation and repair, *including interest on bonds* (folio 11) such interest (folio 11), the annual expense does not exceed \$12,034.99 for the whole system.

It will not be disputed, we think, on the argument, that this amount included all taxes on the water system, counsel fees, the portion of the expense of the Boston office of the corporation attributed to the water department, as well as all local expenses of repairs, management and operation of the water system.

Therefore, the bill shows on its face, that the revenue from the system, only from four-sevenths to two-thirds employed, is to the annual expense of operation and management, and the keeping of the whole system in repair and ready for operation, as \$25,715, is to \$12,034.99 at the outside.

This shows from the bill itself, that the allegation in folio 13, that the revenue is not sufficient to pay operating expenses and maintain the system is not true.

The increase of rate then is really demanded to enhance net revenue; as is stated in folio 14, to "pay said company a reasonable interest on its investment in said plant."

The question therefore is presented upon the face of the bill, whether the allegation that the corporation overestimated the capacity of its system, or underestimated the cost of repairs, operation and management, when it established the \$3.50 rate, shows sufficient equitable reason for the compulsory increase of rates in order to enhance the net revenue of the corporation.

It is on its face an attempt by one party to a mutual property relation, constituted at the terms proposed and established by that party, to shift the burden of its alleged under estimates and mistaken calculations upon the other party to the relation, in order to realize the expected profits.

For, we repeat, what has already been insisted upon, that the corporation with perfect freedom, and with special and exclusive means of knowledge of all the elements which should enter into its problem of rates, fixed them in advance and at them so fixed, invited the defendants to acquire their perpetual easements by purchase or otherwise.

The evils and injustice of violating this contractual relation in the manner disclosed in the bill, must exceed any possible inconvenience from adhering to the contracts made and so long acted upon by all concerned. If pleas of self-induced mistakes are sufficient to excuse such arbitrary exercise of power in the name of the State, as is shown in the bill, where is it to end?

The bill asserts (folio 11) a right to \$119,791.66 per annum from rates at the *lowest* legal maximum of net revenue when fixed by public authority. According to the bill the income from the domestic rates, which the corporation does not seek to increase, and therefore concedes are full high, is about \$11,715; if the excess beyond this sum, of the amount of \$119,791.66, the legal right to which is asserted, were enforced on the 4,000 acres of land now under irrigation, the irrigation rate would be over seven times that established when the easements of defendants vested. What it would be at the highest legal maximum of eighteen per cent, we do not attempt to compute. Even if this asserted right to net revenue from irrigators who have *purchased* their easements, or otherwise acquired them so that they stand as to rates on the same footing with purchasers, were spread over the whole 6,000 or 7,000 acres which the bill asserts are within the capacity of the system, still it would be a crushing burden and would mean simply the abandonment of the lands.

If it be answered to this, that the corporation does not now seek the full measure of its asserted legal

right to the \$119,791.66, but is for the present content with simply doubling the irrigation rate, instead of increasing it sevenfold or some other multiple, the rejoinder is, that the bill asserts the power on part of the corporation to increase the rate to the legal standard; and, if to net six per cent, why not to net eighteen per cent, since the statute declares that either of them or any rate between them, is lawful if imposed by a competent rate fixing power? A full exercise of the power, if it existed, would go far toward reducing the irrigators to the legal status of the Egyptian fellahs in the time of the Pharaohs.

If the contracts are to be disregarded, it is the grace, or prudential wisdom of the corporation, and its estimate of what the "traffic will bear", that would constitute the only saving element in the situation.

For, according to the bill, the Board of Supervisors could not lawfully fix the rates to yield less than the \$119,791.66; and the bill virtually admits that it does not seek to exact more than \$39,715 now, for the reason, as is quite apparent, that even the corporation does not believe, that the "traffic could bear" any more.

But the original bill alleges the right to a minimum return of \$119,791.66, per annum; this is decreed to have been confessed by defendants, after all protection by their contracts had been swept away. If the alleged self-induced mistakes of the corporation in fixing the original rate, is a good reason for doubling

that rate, so as to make it yield \$39,715, why has it not power under this decree to again increase the rate, on another January 1st, to yield the \$119,791.66 per annum?

*This shows why these defendants under this decree, find that the Constitution as so administered, bears fruits which are for them and for the corporation, apples of Sodom. The corporation has stormed the Citadel of the State Constitution and turned what were supposed to be the defenses of the irrigators, into vantage ground against them. If it were not a matter so serious, it would be ludicrous, to contemplate this complete reversal of the expectations from the declaration of the public use.*

Here is a corporation which now yearns for the State to absolutely regulate and control its franchise to collect water rates. It would renounce all right to make contracts concerning them.

It is a most unheard of attitude for a corporation to take. Where in all the history of this court, or any court, is there to be found a parallel?

There must be some reason for this unnatural fondness for passing under the rod of public control.

Is it because there is the temptation to exchange the power to contract, for the power to play the part of the State in repealing an old and enacting an increased rate? Or, does the promise of escaping from its contracts prove seductive?

Or, when worst comes to worst, (or shall we say when the coveted end is attained), and the Board of Supervisors shall undertake to fix rates, does the supposed guarantee by the public power of a minimum of six per cent net revenue, whatever the value of the service, with the fighting chance in the field of politics, for higher rates up to eighteen per cent net revenue, console for the voluntary renunciation of the liberty to transact business by contract, as do all other corporations?

For where has it been heard that railway corporations could make no contract by bills of lading, or passenger tickets, or steamship lines, by charter-parties or passage tickets, because they are quasi-public corporations?

It is not necessary to make any formal answer. The phenomenon presents itself; it is an interesting subject of speculation.

But the bill presents no element of equity; in its essential theory, it neither follows the law, statutory or otherwise; it asks the aid of the court to enable the corporation to recoup from the irrigators, for its own alleged miscalculations respecting expected net profits from the rate at which it induced them to settle under the system; it invokes the court to do that which it has no power to do, to establish a rate; it advances to a decree over a pathway strewn with its broken contracts and with disrupted property relations, out into a weltering sea of uncertain strife, in

which all hope of prosperity of the company and the people must be swamped. It is respectfully submitted that the original bill of complaint states no case, and affirmatively shows that there was and is none; and therefore, that the errors alleged in the fourteenth, fifteenth, sixteenth, seventeenth and eighteenth assignments of errors on appeal (Trans. pp. 104-109) and in the corresponding specifications in this brief (pp. 69-80) are well assigned.

### IX.

**Errors upon the Merits, in sustaining Exceptions to Answer, submitted to have been well assigned.**

1. The answer, so far as it states the history of the water rights, easements and servitudes of the defendants, and shows that they vested pursuant to contracts express or tacit and implied, and are interests in reality; and so far as such answer states contracts express and implied respecting the rate of \$3.50 per acre, per annum for the continued enjoyment of such easements, is virtually in mere amplification of the allegations of the bill relating to the ownership by defendants of their water rights by purchase or otherwise (folio 10), and that the corporation at the outset fixed and established and thereafter to January 1, 1896, collected that rate and no more (folio 13).

So far as exceptions were sustained to all such matters contained in the answer, relating to vested easements of the defendants, and the contract rate of \$3.50 per acre, per annum; and to all matter in the an-

swer invoking the provisions of the State and Federal Constitutions, and the Statutes of the State, in protection of such rights, it is respectfully submitted, upon the foregoing discussion, that the errors alleged in the sixth, eighth, tenth and eleventh assignments of error on appeal (Trans. pp. 97, 100, 101), and in the corresponding specifications in this brief (pp. 54, 60, 61, 63) are well assigned.

2. So far as exceptions, first and fifth to the answer proceeded on the ground that the defendants had no standing in the court to contest the reasonableness of the rate of \$7 per acre, per annum, demanded by the complainant, it is respectfully submitted upon the foregoing discussion, that if it was competent for the corporation to supersede the \$3.50 rate per acre, per annum, and establish *any* higher rate, then the error in that behalf alleged in tenth assignment of error on appeal (Trans. p. 101), and in the corresponding specification in this brief (p. 62), is well assigned.

## X.

### Questions of Practice and Procedure.

#### 1.

The question as to whether the Bill of Review lies has been discussed. (Ante p. 84 et seq.)

#### 2.

The Exception first to the Answer for Impertinence, was not the proper method for raising the question of the merits of the affirmative defenses set forth in the Answer.

This question is formally raised by the first assignment of error in the Bill of Review (folio 104); and is



preserved in the *4/11th* assignment of error on appeal (folio 159); and the corresponding specification of error in this brief (p. 54). And it was competent to raise it by the Bill of Review. (See authorities cited *ante* p. 85).

It is apparent that the elaborate exception *first* to the answer, was made to perform the function of a demurrer to the validity of the defenses, and not of an exception for impertinency. The allegations of contract and statutory and constitutional rights, set up in the answer against the claim of power of the Receiver to increase the rate, were not in any sense impertinent or mere "tales of a tub" as an old Chancellor styled impertinent matters. *Harrison v. Perca* 168 U. S. 311, 318-319. They were pleaded as substantive and affirmative defenses; they raise important questions upon the merits, for decision; and some of them received from the court below the elaborate consideration, their importance deserved.

But the exceptions under guise of charges of impertinency, undertook to question, and were treated as questioning the validity of the answer as a defense, as though such exceptions were a true demurrer.

But a demurrer to the answer is unknown in equity practice. *In re Sanford Fork & Tool Co.*, 160 U. S. 247, 257; *Stone v. More* 26 Ills. 165, 172; *Broken v. Mortgage Co.* 110 Ills. 235, 241; *Berry v. Abbott* 100 Mass. 396, 398; *Grether v. Wright* 75 Fed. 742, 743-4; *Travers v. Ross* 14 N. J. Eq. 254, 258. In the case last cited, it is said:

"In equity a demurrer is only a mode of defense to the bill. *It is never resorted to* to settle the validity of a plea or an answer. Such method of proceeding is not recognized in the books." (Citing numerous authorities).

The result of this practice was the expunging of all these defenses from the record, and the entry of a decree in form *pro confesso*. As already suggested, this left it doubtful whether a direct appeal from the decree *pro confesso* would have brought the questions presented by the answer, into the record, and before this court (see this brief p. 87). The defendants were thus constrained to perform the decree, and to file their bill of review, in order to make certain that the matter expunged from the answer was brought into the record.

But if the complainant desired to try the merits of the defenses as pleaded, the defendants had the right to have them finally tried, in the case set down for hearing on bill and answer; and not to have them tried only provisionally, as a sort of moot question, on those improper exceptions; and the defendants were entitled to have all the defenses in their answer before this court on an appeal direct from the original decree; and were entitled to have the whole case finally so disposed of by this court.

But unless the form of the other so called exceptions to the answer, amounts to a setting of this case down on the bill and answer, as to which we submit later on, a reversal or vacating of the original decree

below, might not be a final disposition of the case on the merits, but merely a decision of a question of pleading.

*In re Sanford Fork & Tool Co.*, 160 U. S. 247, 257

It is respectfully submitted, that the *fifth* assignment of error on appeal (Trans. p. 97), as correspondingly specified in this brief (ante p. 54), is well assigned.

### 3.

**The paragraphs Third, Fifth and Sixth under head of Exceptions taken by Complainant to the Answer of Defendants, are not Exceptions in any sense known to the practice in Equity; but, they amount to the setting down and submission of the cause on Bill and Answer; and appellants are entitled to have the cause so considered and disposed of.**

The third, fifth and sixth so called exceptions to the answer, are set out at page 60 of the Transcript, and copied in the statement of the case in this brief (ante pp. 45-6).

It is, we submit, apparent that these are not exceptions in any sense known to equity practice.

They do not constitute exceptions for insufficiency in the discovery, for they rely upon the disclosures in the answer as fully and affirmatively supporting the bill and as entitling complainant to the relief prayed for in his bill.

This being so, we submit that the filing of the charges in these paragraphs, and the bringing of the

cause to hearing, and the hearing upon them, was tantamount to the setting down and the hearing of the cause on bill and answer. Equity Rule 41 as amended at December term 1871, 13 Wall. XI. Equity Rule 60.

It was open to the complainant at that stage of the case, to have the cause so set down. What other effect can be given to the proceeding?

It was said in *Reynolds v. Crawfordsville Bank* 112 U. S. 405, 409:

"The setting the case down for hearing on bill and answer is in effect a submission of the cause to the court by the complainant, on the contention that he is entitled to the decree prayed for in his bill upon the admissions and not withstanding the denials of the answer."

This is the precise tenor of the claim made by the third, fifth and sixth paragraphs, under the misnomer of exceptions to the answer; by sustaining this claim, did not the court specifically decide in the language of the paragraphs:

"That it appears affirmatively from the answer of the defendants, that the complainant has legally established and is entitled to collect a water rental of \$7.00 per acre per annum for the irrigation of the lands of defendants . . . as alleged in the bill of complaint (Par. 5th); and,

"That the said answer shows on its face that the complainant is legally and equitably entitled to charge and collect the rate of \$7.00 per acre for the irrigation of the lands of defendants, and that said rate is reasonable and just?" (Par. 6th).

We are unable to distinguish the substance of this submission from a formal submission on bill and answer.

To so hold it, does not contravene the decision in *Sanford Fork & Tool Co.*, *supra*, 160 U. S. 247, 257-8; nor, go as far as did the decisions in *Barry v. Abbott* 100 Mass. 396, 398, and in *Grether v. Wright* 75 Fed. R. 742, 744; for in none of these cases, did the plaintiff rely upon the answer and submit that it established the right to the relief claimed in the bill. *This the complainant did here.* It is similar to the case of *Banks v. Manchester* 128 U. S. 244, 250.

"In such case allegations of new matter in the answer, are to be taken as true." *Banks v. Manchester*, *supra*, p. 251; and cases there cited. *Sanford Fork & Tool Co.*, *supra*, 160 U. S. 247, 257.

It is therefore submitted that the original cause is to be treated as having been submitted by complainant on bill and answer and disposed of by final decree accordingly. Also that it should be so disposed of in this court, and in all further proceedings pursuant to its direction.

4.

**The paragraph, entitled exception second to the Answer, is not an exception in substance or form, and it was error to sustain it.**

The bill alleges: "That each of said defendants has, by purchase or otherwise, become the owner of a wa-

"ter right to a part of the water appropriated and "stored by said company necessary to irrigate his tract "of land." The answer fully admits this (folio 24); then goes on to state (folios 24-34) in what way the several classes of defendants acquired their water rights from the corporation. The charge made in the exception is, in substance, that the answer does not state which of the defendants acquired their water rights by purchase, or how much they paid for them, and that for this reason the answer is evasive and uncertain.

But the allegation of the bill calls for no answer in these respects. It simply alleges that each of the defendants has *by purchase or otherwise* become the owner of a water right.

Having admitted this, the defendants were not required to detail which of them *purchased* their water rights, or which of them acquired their rights *otherwise*.

The bill makes no allegation in that respect; therefore it calls for no answer or discovery in that behalf.

The exception assumes incorrectly, that a theory of the defense in the answer, is to claim an abatement of the increase of rates to the extent of the interest on the money paid to the company in purchase of water rights. But this is an entire misapprehension.

Moreover an exception will not lie to a substantive

defense, not responsive to the plaintiff's inquiry in the bill.

*Adams v. Iron Co.* 6 Fed. Rep. 179.

*Bozzer, & Co., Iron Co. v. Wells, & Co., Iron Co.*, 43 Fed. 391.

It is submitted that the second so-called exception to the answer was erroneously sustained, and that error in that behalf is well assigned. (Tr. folios 109, 163; specification in brief ante p. 59).

### 5.

It is apparent without discussion, that the exception *fourth* (Trans. p. 60) is so defective in form that it is meaningless; it points out nothing; it fails to inform the defendants, or the court, of any insufficiency in the answer to any allegation of the bill.

It is submitted that this exception was erroneously sustained and that error in that behalf is well assigned. (Folios 110, 164; specification in brief p. 61).

### 6.

**Notwithstanding that the "Exception" to the Answer numbered first, for impertinency, was sustained, it was error in procedure to render the decree pro-confesso, in disregard of the unexpunged admissions of the Answer and of the issues raised by the denials and averments remaining in the Answer, and not excepted to.**

This charge of error is presented by the *ninth* assignment in the bill of review. (Trans. p. 73), as preserved in the thirteenth assignment of error on appeal (folios

167-170), and the corresponding specification in the brief (ante pp. 64-69).

This assignment points out, not only that the unexpunged admissions and averments of the answer, showed all the matters which, appearing on the face of the bill, establish that the complainant has no cause of action, as argued in division VIII of this brief (ante p. 242): but in addition that the unexpunged averments of the answer show, if the whole question as to the rates were open, and not foreclosed under the facts, by the statute, and by the contracts and vested rights of the defendants as hereinbefore submitted, and it were now a question *de novo*, as to whether any increase of the \$3.50 rate were reasonable, that no increase would be reasonable.

The following, among the unexpunged portions of the answer are *in hac verba*:

"And these defendants deny that the annual expenses of said corporation to operate and maintain its water system exceed the sum of \$12,034.99, as in the bill alleged," (Folio 39).

"And these defendants deny and each of them denies that in order to pay the said company the amount of its annual expenses and an annual income of six per cent upon the present cost and present value of its said water system it is necessary that the rates for water sold and consumed be so fixed as to realize to said company, when its system is wholly employed, the sum of \$119,791.66 or any less sum in excess of \$32,000 per annum.

"And defendants aver that neither the present cost nor the present cash value of the whole of said property constituting said water system exceeds the sum



"of \$300,000.00, and that not over one-half of the capacity of said system was on January 1st, 1896, in use, and that not over two-thirds of the capacity of said system is now in use.

"And defendants deny that in order to pay the cost of operating the plant of said company and maintaining the same and pay said company as much as six per cent net annual revenue upon the present cost and cash value of its said plant and water system it is or will be necessary to charge a rate per acre per annum of not less than \$7.00 for irrigation purposes or any sum in excess of \$3.50 per acre per annum for irrigation purposes in connection with the rate for water for domestic use under said system actually established and collected."

Now these allegations of the answer were not excepted to; taken together with the undenied and admitted allegations of the bill, they make material issues upon the vital parts of the bill, if the question of rates can be treated as *res integra*—i. e. as though the easements had not been purchased or otherwise acquired by defendants, and as though no contract express or implied as to rates had been made.

Under equity rule 64 the plaintiff for default of a full and complete answer after exception for insufficiency allowed, "is entitled only to take the bill, *so far as the matter of such exception is concerned*, as confessed." *In re Sanford Fork & Tool Co., Petitioner*, 160 U. S. 247, 256.

But there were no exceptions of any kind to the matters above quoted from the answer. There was not, as we think we have shown above, a single valid or proper exception for insufficiency to any part of the

answer; therefore, there was no matter concerned in any exception which could under the same, be taken *pro confesso*. It is true affirmative defenses were, as we have submitted, erroneously expunged.

But the parts of the answer unexcepted to, tendered issues upon the allegations of the bill; if those allegations of the bill were material, then the issues tendered by the answer were also material. Therefore it was grave error in the procedure to order the bill to be taken *pro confesso*, ignoring such issues tendered by the answer.

It was held in *Hovey v. Elliott* 167 U. S. 409, that not even where a defendant was guilty of contempt in disobeying an order of the court, did the court have the power to strike out his answer and order that a decree *pro confesso* be taken against him.

Much less would it seem to have been competent to order the bill in this case to be taken *pro confesso*, in disregard of issues tendered which, on the assumption that the bill stated a cause, were vital; and which remained and still remain in the answer unassailed and intact.

These unexpunged allegations of negative and affirmative matter in defense, were not inconsistent with the allegations that the easements of the defendants vested under contracts at the rate of \$3.50 per annum; for there is nothing inconsistent in the allegation that that was the contract rate, and also that it was sufficient

in connection with the domestic rates to pay the cost of operating and maintaining the plant, and to pay the company as much as six per cent upon the present cost and value of the plant.

The fact that the court passed its decree while the answer stood tendering the issues above stated, and without issue joined by replication, strengthen the argument that the real nature of the submission, under the *third*, *fifth* and *sixth* misnamed exceptions, was as above argued upon bill and answer. Then upon the theory adopted by the court as shown by its opinion, that the court could not go into the question of the reasonableness of the demanded \$7.00 rate, it is explicable how the decree, erroneous though it be, was reached; otherwise, considered in respect of the mere procedure, we are at a loss to see how it was reached.

It is respectfully submitted that in point of procedure, it was irregular to enter the decree in form *pro confesso*; and that although rendered such in form, it was in fact rendered on bill and answer; and that as such it is essentially final; and that if it be considered by the court that the bill states a cause of action, the decree is erroneous in not giving due effect to the unexpunged portions of the answer; and that if the bill states no cause of action the decree was erroneous as submitted in division VIII of this brief.

## 7.

**The San Diego Land & Town Company of Maine did not become a party to the record so that it was competent to make the decree herein in its favor.**

The above proposition is presented by the *fifteenth* assignment of error in the bill of review (Trans. p. 78); in the *nineteenth* assignment of error upon appeal (Trans. p. 109); and, by the corresponding specification in this brief (ante p. 80).

The proceedings relating to the substitution of the San Diego Land & Town Company of Maine, have already been stated, (ante pp. 46-47). See also Trans. folios 93-99. The decree is in favor of "San Diego Land & Town Company of Maine, substituted as complainant in place of Charles D. Lanning, Receiver of the San Diego Land & Town Company, complainant." (Trans. p. 64).

The Receivership was of the Kansas corporation.

The Maine corporation was not a party to the motion, argument, or order directing the discharge of Lanning and the substitution of the Maine corporation. The first appearance of the Maine corporation was on Dec. 6, 1897, in moving for decree *pro confesso* (Trans. p. 62); from thence onward to, and in, the final decree its name appears as complainant.

But there is no allegation in the complaint, or in any supplemental complaint, to show who, or what the San Diego Land & Town Company of Maine is; or

what is its interest in the suit, or what claim it has to relief.

There is a suggestion in the notice of motion (folio 93) that all the property mentioned and described in the bill of complaint had, under the decree of the court, been sold by the Receiver to said San Diego Land & Town Company of Maine and the proceeds of the sale received by the Receiver; that the receivership had been fully settled and closed, and that the San Diego Land & Town Company of Maine had acquired all the right, title and interest of the San Diego Land & Town Company of Kansas in and to all of said property and is now the only party interested in the further litigation of the questions in this suit.

But this is entirely *inter alia*; it does not supply the place of issuable allegations by the complainant to be substituted. The decree proceeds on the bill and not otherwise; and until the bill by proper supplement is made to contain proper allegations to show change of interest, and that the substituted complainant is the real party in interest in issuable form, upon what basis of allegation or proof, or confession, does the decree go for the new plaintiff?

The case of a suit becoming defective by transfer pursuant to judicial sale of the entire interest of the complainant, as suggested in the motion, is provided for in Equity Rule 57.

The authorities seem to establish that the proper practice in such a case, is for the transferee of the or-

iginal plaintiff to file an original bill in the nature of a supplemental bill, and not a supplemental bill merely.

*Greenleaf v. Queen* 1 Pet. 138, 148.

*Tappan v. Smith* 5 Biss 73, Fed. Cases No. 13748.

*Hazleton & Co. v. Citizens' St. Ry. Co.* 72 Fed. Rep. 325, 329.

Story's Equity Pl. Secs. 348, 349.

The defendants have the right to demur, plead or answer to such bill.

The sum paid at a purchase of the water system under the decree of a court, may be material in an action relating to water rates under such system. *Dove v. Biedleman* 125 U. S. 680, 690-1. Upon an original bill in the nature of a supplemental bill the whole case is open; 2 Daniell Ch. 4 Am. Ed. 1518, 1519, citing Lord Redesdale, 64, 65. To that opportunity defendants were entitled.

It is submitted that this error in procedure is well assigned.

#### 8.

#### **Jurisdiction of the Circuit Court over the Cause.**

This question is raised by the *sixteenth* assignment of error in the bill of review, (Trans. p. 78), and the corresponding assignments of error on appeal and specifications in the brief.

The original bill shows a controversy between citizens of different states, but does not show that the amount involved between the plaintiff and any defendant severally interested, or any defendants jointly interested, equals the sum of \$2,000 (Trans. pp. 6-12). The answer (folio 50) shows to the contrary. It is not competent to aggregate the claims to increase of water rates against different defendants, severally interested, in order to make out the jurisdictional amount. *Walter v. Northeastern Railroad Company* 147 U. S. 370, 373, and cases there cited.

Nor could any unaccrued increase of rentals be considered to make out the jurisdiction. See the following cases involving the analagous questions relating to the appellate jurisdiction of this court.

*Washington, etc., Railroad v. District of Columbia* 146 U. S. 227, 252.

*Clay Center v. Farmers' Loan & Trust Co.* 145 U. S. 224, 225.

Considered as an original suit, and independent of the suit in which the Receiver was appointed, the amount involved is not shown by the original bill to be sufficient to make out the jurisdiction; and it appears by the answer to be insufficient.

Hence the assertion of jurisdiction in the Circuit Court must be rested on the claim that this suit is ancillary to that in which the Receiver was appointed.

The original bill (in the sense of the rules of equity

pleading) in the case at bar, showed in substance, that Charles D. Lanning was by an order and decree of the Circuit Court of the United States for the District of Massachusetts made in another cause, September 4, 1895, and confirmed Sept. 30, 1895, by the order and decree of the Circuit Court below, appointed Receiver of all the property of the Kansas corporation "with full power to take possession of and manage and operate and control all of its said property including the land and water system in this bill mentioned"; and that by virtue of said orders and decrees the complainant took possession of and is managing said property as such Receiver (Trans. p. 8). The bill further shows that the attempt of the Receiver to establish the increased rental, and to enforce the payment of such increase by shutting off the water from the premises of the defendants, was done under a claim that he was authorized by law so to do (Trans. p. 11); and the suit is brought to enforce such claims both to the increase of rents, and to the power to shut off the water to enforce collection thereof.

It was said in the case of *Pope v. Louisville, New Albany & Chicago Railway Company*, 173 U. S. 573, 577.

"When an action or suit is commenced by a receiver, appointed by a Circuit Court, to accomplish the ends sought and directed by the suit in which the appointment was made, such action or suit is regarded as ancillary so far as the jurisdiction of the Circuit Court as a Court of the United States is concerned."

If the fact of a mere claim made in his bill by the Receiver, that he had authority to increase the irrigation



rate and to enforce collection of it, brings the case for purposes of jurisdiction, within the terms of the power conferred by the order of his appointment, then the ancillary jurisdiction is made out.

If, on the other hand, in order to establish the ancillary jurisdiction, it must appear *in limine*, upon the face of the bill, that this suit was commenced to accomplish the ends sought and directed in the order appointing the Receiver; that is to say, if it must appear, as preliminary, that general authority to make and enforce new rates as against vested easements, was, as shown on face of the bill, in fact embraced in the power conferred on the Receiver by the order, to manage, operate and control the water system, then it would seem that the main question upon the merits, in the case, must be determined in order to ascertain whether ancillary jurisdiction has attached.

For how can there be ancillary jurisdiction, unless the case as stated in the bill, is within the scope and terms of the powers alleged to be conferred on the Receiver?

Allegations of fact showing that the case is in fact ancillary must be made, before the courts can entertain the case as ancillary; if these allegations fail, how does it appear that there was ancillary jurisdiction?

In the case of *Ill. hite v. Ewing* 159 U. S. 36, 38, there could be no question on the face of the ancillary bill, but that the suit to collect debts alleged to be due the corporation, was in the strict line of the order appoint-

ing the Receiver. The case therefore on the face of the bill showed ancillary jurisdiction.

But here the question arises on the face of the bill, whether the purpose and object of the suit is comprehended within the power alleged to have been conferred in the suit in which the Receiver was appointed, to take possession of and manage, operate and control the water system.

With these observations, we submit the question of jurisdiction with the further remark, that in any point of view, the cardinal question upon the merits in the case, stands for decision.

The power conferred upon the Receiver by the order appointing him, is the same power which the corporation would have had but for the appointment of the Receiver—no greater. The question, therefore, as to what power over rates, as against these defendants, was embraced in the order appointing the Receiver, is the same in substance, as the question whether the corporation itself had the lawful power to increase the irrigation rate, and to shut off the water to enforce collection of such rate, in the manner shown by the record. And the question whether a power to increase the irrigation rate, was conferred on the Receiver by the order appointing him, is the same as, whether he was entitled to the relief prayed for in the bill.

**CONCLUSION.**

The statement of the main question in this case, to which all others are subordinate, viz: Whether in this state, contract relations between water corporations and irrigators of land, respecting water rights and water rates, can come into existence, shows its importance; the question is upon a scale as extended as the boundaries of the state.

It is hoped that no want of respectful earnestness of dissent from the views entertained, with his accustomed firmness, by the able, highminded, and honored Circuit Judge, who made the decision, detracts from the propriety of the foregoing discussion. The principles involved, stand upon a height which make<sup>s</sup> them sacred, and impersonal. <sup>^</sup>

New and alien schools of social organization and of politics, are attacking with gathering force the essential ideas which penetrate and inform every recess of the Federal Constitution, and for the most part the Constitutions of the States. This case illustrates the famous Eighteenth declaration of rights in the Constitution of Massachusetts of 1780, and shows that "a frequent recurrence to the fundamental principles of the Constitution" is "absolutely necessary to preserve the advantages of liberty and to maintain a free government." And if the invoking of these constitutional principles by individuals, as in this case, against corporate power, is less frequent than the invoking by corporations of constitutional safeguards against en-

croachment by popular bodies, it only illustrates the equal beneficence of these precious and time-honored guarantees.

It is respectfully submitted upon the record, that the demurrer to the bill of review was erroneously sustained; and that the decree of the Court below, dismissing the bill of review, should be reversed, and the record remanded with instructions to reverse the decree in the original suit, and to finally dismiss the bill filed therein; or, for such other proceedings in such original suit, as are not inconsistent with the opinion of the court.

C. H. RIPPEY,

M. L. WARD,

A. HAINES,

For Appellants.

GEO. FULLER, of Counsel.

**APPENDIX.****Constitution of State of California:****ARTICLE I.****Declaration of Rights.**

Section 1. All men are by nature free and independent, and have certain inalienable rights, among which are those of enjoying and defending life and liberty; acquiring, possessing, and protecting property; and pursuing and obtaining safety and happiness.

**ART. XII.****Corporations.**

Section 15. No corporation organized outside the limits of this State shall be allowed to transact business within this State on more favorable conditions than are prescribed by law to similar corporations organized under the laws of this State.

**ART. XIV.****Water and Water Rights.**

Section 1. The use of all water now appropriated, or that may hereafter be appropriated, for sale, rental, or distribution, is hereby declared to be a public use, and subject to the regulation and control of the State, in the manner to be prescribed by law; provided that the rates or compensation to be collected by any person, company, or corporation in this State for the use of water supplied to any city and county, or city or town, or the inhabitants thereof, shall be fixed, annually, by the board of supervisors, or city and county, or city or town council, or other governing body of such city and county, or city or town, by ordinance or otherwise, in the manner that other ordinances or legislative acts or resolutions are passed by such body, and shall continue in force for one year, and no longer. Such ordinances or resolutions shall be passed in the month

of February of each year, and take effect on the first day of July thereafter. Any board or body failing to pass the necessary ordinances or resolutions fixing water rates, where necessary, within such time, shall be subject to peremptory process to compel action at the suit of any party interested, and shall be liable to such further processes and penalties as the legislature may prescribe. Any person, company, or corporation collecting water rates in any city and county, or city or town in this State, otherwise than as so established, shall forfeit the franchises and water works of such person, company, or corporation to the city and county, or city or town where the same are collected, for public use.

Sec. 2. The right to collect rates or compensation for the use of water supplied to any county, city and county, or town, or the inhabitants thereof, is a franchise, and cannot be exercised except by authority of and in the manner prescribed by law.

#### **ART. XX.**

Sec. 9. No perpetuities shall be allowed except for eleemosynary purposes.

#### **STATUTES.**

*Act, approved May 14, 1862 (Statutes of Cal. 1862, p. 540).*

Section 1. Corporations may be formed, under the provisions of an Act entitled an Act to provide for the Formation of Corporations for certain purposes, passed April fourteenth, eighteen hundred and fifty-three, and the several Acts amendatory thereof and supplemental thereto, for the following purposes: The construction of canals, for the transportation of passengers and freights, or for the purpose of irrigation or water power, or for the conveyance of water for mining or manufacturing purposes, or for all of such purposes.

Sec. 2. The right is hereby granted to any company organized under the authority of this Act, to construct all works necessary to the objects of the company, to make all surveys necessary to the selection of

the best site for the works, and of lands required therefor, and to acquire all lands, waters not previously appropriated, and other property necessary to the proper construction, use, supply, maintenance, repairs, and improvements of the works in the manner and by the mode of proceedings prescribed in an Act entitled an Act to provide for the Incorporation of Railroad Companies, and the management of the affairs thereof, and other matters relating thereto, passed May twentieth, eighteen hundred and sixty-one.

Sec. 3. Every company organized as aforesaid shall have power, and the same is hereby granted, to make rules and regulations for the management and preservation of their works, not inconsistent with the laws of this State, and for the use and distribution of the waters and the navigation of the canals, and to establish, collect, and receive rates, water rents, or tolls, which shall be subject to regulation by the Board of Supervisors of the county or counties in which the work is situated, but which shall not be reduced by the Supervisors so low as to yield to the stockholders less than one and one-half per cent per month upon the capital actually invested.

\* \* \* \* \*

Sec. 6. This Act shall take effect from and after its passage.

#### ACT

**Approved April 5, 1876.**

(Civil Code Sec. 552). Whenever any corporation, organized under the laws of this State, furnishes water to irrigate lands which said corporation has sold, the right to the flow and use of said water is and shall remain a perpetual easement to the land so sold, at such rates and terms as may be established by said corporation in pursuance of law. And whenever any person who is cultivating land on the line and within the flow of any ditch owned by such corporation, has been furnished water by it with which to irrigate his land, such person shall be entitled to the continued use of said

water, upon the same terms as those who have purchased their land of the corporation.

# **ACT**

**Approved March 12, 1885.**

"Section 1. The use of all water now appropriated, "or that may hereafter be appropriated, for irrigation, "sale, rental, or distribution, is a public use, and the "right to collect rates or compensation for use of such "water is a franchise, and except when so furnished to "any city, city and county, or town or the inhabitants "thereof, shall be regulated and controlled in the "counties of this State by the several Boards of Supervisors thereof, in the manner prescribed in this Act.

"Section 2. The several Boards of Supervisors of "this State, on petition and notice as provided in section three of this Act, are hereby authorized and required to fix and regulate the maximum rates at "which any person, company, association or corporation, having or to have appropriated water for sale, "rental or distribution, in each of such counties, may "and shall sell, rent or distribute the same.

"Section 3. Whenever a petition of not less than "twenty-five inhabitants, who are tax payers of any "county of this State, shall, in writing, petition the "Board of Supervisors thereof, to be filed with the "Clerk of said Board, to regulate and control the rates "and compensation to be collected by any person, "company, association, or corporation, for the sale, "rental, or distribution of any appropriated water, to "any of the inhabitants of such county, and shall in "such petition specify the persons, companies, associations, or corporations, or any one or more of them, "whose water rates are therein petitioned to be regulated or controlled, the Clerk of such Board shall immediately cause such petition, together with a notice of the time and place of hearing thereof, to be "published in one or more newspapers published in "such county; and if no newspaper be published "therein, then shall cause copies of such petition and "notice to be posted in not less than three public places "in such counties, and such publication and notice



"shall be for not less than four weeks next before the  
 "hearing of said petition by said Board; such notice to  
 "be attached to said petition shall specify a day of the  
 "next regular term of the session of the said Board,  
 "not less than thirty days after the first publication,  
 "or posting thereof, for the hearing of said petition,  
 "which shall impart notice to all such persons, com-  
 "panies, associations, and corporations, mentioned in  
 "such petition, and all persons interested in the mat-  
 "ters of such petition and notice. Such Board may  
 "also cause citations to issue to any person or persons  
 "within such county, to attend and give evidence at  
 "the hearing of such petition, and may compel such  
 "attendance by attachment.

"Sec. 4. At the hearing of said petition the Board  
 "of Supervisors shall estimate, as near as may be, the  
 "value of the canals, ditches, flumes, water chutes, and  
 "all other property actually used and useful to the ap-  
 "propriation and furnishing of such water, belonging  
 "to and possessed by each person, association, com-  
 "pany, or corporation, whose franchise shall be so reg-  
 "ulated and controlled; and shall in like manner es-  
 "timate as to each of such persons, companies, associ-  
 "ations, and corporations, their annual reasonable ex-  
 "penses, including the cost of repairs, management,  
 "and operating such works; and, for the purpose of  
 "such ascertainment, may require the attendance of  
 "persons to give evidence, and the production of pa-  
 "pers, books, and accounts, and may compel the at-  
 "tendance of such persons and the production of pa-  
 "pers, books, and accounts, by attachments, if within  
 "their respective counties.

"Sec. 5. In the regulation and control of such wa-  
 "ter rates, for each of such persons, companies, associ-  
 "ations, and corporations, such Board of Supervisors  
 "may establish different rates at which water may and  
 "shall be sold, rented, or distributed, as the case may  
 "be; and may also establish different rates and com-  
 "pensation for such water so to be furnished for the  
 "several different uses, such as mining, irrigating, me-  
 "chanical, manufacturing, and domestic, for which

"such water shall be supplied to such inhabitants, but  
 "such rates as to each class shall be equal and uni-  
 "form. Said Boards of Supervisors, in fixing such  
 "rates, shall, as near as may be, so adjust them that the  
 "net annual receipts and profits thereof to said per-  
 "sons, companies, associations, and corporations so  
 "furnishing such water to such inhabitants shall be not  
 "less than six nor more than eighteen per cent upon  
 "the said value of the canals, ditches, flumes, chutes,  
 "and all other property actually used and useful to the  
 "appropriation and furnishing of such water for each  
 "of such persons, companies, associations and corpora-  
 "tions; but in estimating such net receipts and profits,  
 "the cost of any extensions, enlargements or other  
 "permanent improvements of such water rights or  
 "water works shall not be included as part of the said  
 "expenses of management, repairs, and operating of  
 "such works, but when accomplished, may and shall  
 "be included in the present cost and cash value of such  
 "work. In fixing said rates, within the limits afore-  
 "said, at which water shall be so furnished as to each  
 "of such persons, companies, associations, and corpora-  
 "tions, each of said Board of Supervisors may like-  
 "wise take into estimation any and all other facts, cir-  
 "cumstances, and conditions pertinent thereto, to the  
 "end and purpose that said rates shall be equal, rea-  
 "sonable, and just, both to such persons, companies,  
 "associations, and corporations, and to said inhabit-  
 "ants. The said rates, when so fixed by such Board,  
 "shall be binding and conclusive for not less than one  
 "year next after their establishment, and until estab-  
 "lished anew or abrogated by such Board of Supervi-  
 "sors, as hereinafter provided. And until such rates  
 "shall be so established, or after they shall have been  
 "abrogated by such Board of Supervisors, as in this  
 "Act provided, the actual rates established and col-  
 "lected by each of the persons, companies, association  
 "and corporations now furnishing, or that shall herein-  
 "after furnish, appropriated waters for sale, rental, or  
 "distribution to the inhabitants of any of the counties  
 "of this State, shall be deemed and accepted as the le-  
 "gally established rates thereof.

"Sec. 6. At any time after the establishment of such water rates by any Board of Supervisors of this State, the same may be established anew, or abrogated in whole or in part by such Board, to take effect not less than one year next after such first establishment, but subject to said limitation of one year, to take effect immediately in the following manner: Upon the written petition of inhabitants as hereinbefore provided, or upon the written petition of any of the persons, companies, associations, or corporations, the rates and compensations of whose appropriated waters have already been fixed and regulated and are still subject to such regulation by any Board of Supervisors of this State, as in this Act provided; and upon the like publication or posting of such petition and notice, and for the like period of time as hereinbefore provided, such Board of Supervisors shall proceed anew, in the manner hereinbefore provided, to fix and establish the water rates for such person, company, association, or corporation, or any number of them, in the same manner as if such rates had not been previously established; and may, upon the petition of such inhabitants but not otherwise, abrogate any and all existing rates theretofore established by such Board. All water rates when fixed and established as herein provided, shall be in force and effect until established anew or abrogated, as provided in this Act.

"Sec. 7. Each Board of Supervisors of this State, when fixing and establishing, or fixing and establishing anew, or abolishing any previously established water rates, as hereinbefore provided, shall cause a record to be made thereof in the records of such Board, and cause the same to be published or posted in the manner and for the time required for the publication or posting of said petitions and notices.

"Sec. 8. Any and all persons, companies, associations, or corporations, furnishing for sale, rental, or distribution, any appropriated waters to the inhabitants of any county or counties of this State (other than to the inhabitants of any city, city and county, or town therein), shall so sell, rent, or distribute such

"waters at rates not exceeding the established rates  
 "fixed and regulated therefor by the Boards of Super-  
 "visors of such counties, or as fixed and established  
 "by such person, company or association, or corpora-  
 "tion, as provided in this Act.

"Sec. 9. If any person, company, association, or  
 "corporation whose water rates for any county of this  
 "State have been fixed and regulated by a Board of  
 "Supervisors, as in this Act provided, and while such  
 "rates are in force, shall collect for any appropriated  
 "water furnished to any inhabitant of such county wa-  
 "ter rates in excess of such established rates, shall be  
 "liable, in an action by any such inhabitant so ag-  
 "grieved, to a recovery of the whole rate so collected,  
 "together with actual damages sustained by such in-  
 "habitant, with costs of suit.

"Sec. 10. Every person, company, association, and  
 "corporation, having in any county in the State (other  
 "than in any city, city and county, or town therein)  
 "appropriated waters for sale, rental or distribution, to  
 "the inhabitants of such county, upon demand there-  
 "for, and tender in money, of such established water  
 "rates, shall be obliged to sell, rent, or distribute such  
 "water to such inhabitants at the established rates reg-  
 "ulated and fixed therefor, as in this Act provided,  
 "whether so fixed by the Board of Supervisors or oth-  
 "erwise, to the extent of the actual supply of such ap-  
 "propriated waters of such person, company, associ-  
 "ation, or corporation, for such purposes. If any per-  
 "son, company, association, or corporation, having  
 "water for such use, shall refuse compliance with such  
 "demand, or shall neglect, for the period of five days  
 "after such demand, to comply therewith to the ex-  
 "tent of his or its reasonable ability so to do, shall be  
 "liable in damages to the extent of the actual injury  
 "sustained by the person or party making such de-  
 "mand and tender, to be recovered, with costs.

"Sec. 11. Whenever any person, company, associ-  
 "ation or corporation, shall have acquired the right to  
 "appropriated water, or shall have acquired the right  
 "to appropriate such water in this State, such person,  
 "company, association, or corporation, may proceed

"to condemn the lands and premises necessary to such right of way, under the provisions of title seven, of part third, of the Code of Civil Procedure of this State, and amendments made and to be made there-to, and all the provisions of said Code, so far as the same can be made applicable, relating to the condemnation and taking of property for public uses, shall be applicable to the provisions of this Act.

"Sec. 12. This Act shall take effect and be in force from and after its passage."

#### ACT

**Approved March 2, 1897, (Statutes 1897, p. 49).**

Section 1. The Act entitled "An Act to regulate and control the sale, rental, and distribution of appropriated water in this State, other than in any city, city and county, or town therein, and to secure the rights of way for the conveyance of such water to the place of use," approved March twelfth, eighteen hundred and eighty-five, is hereby amended by inserting therein a new section, to be numbered section eleven and one-half thereof, as follows:

Section 11 1-2. Nothing in this Act contained shall be construed to prohibit or invalidate any contract already made, or which shall hereafter be made, by or with any of the persons, companies, associations, or corporations described in section two of this Act, relating to the sale, rental, or distribution of water, or to the sale or rental of easements and servitudes of the right to the flow and use of water; nor to prohibit or interfere with the vesting of rights under any such contract.

Sec. 2. This Act shall take effect immediately, and be in force from and after its passage.

#### CIVIL CODE.

Sec. 711. Conditions restraining alienation, when repugnant to the interest created, are void.

Sec. 715. The absolute power of alienation cannot be suspended, by any limitation or condition whatever, for a longer period than during the continuance of the lives of persons in being at the creation of the limita-

tion or condition, except in the single case mentioned in section seven hundred and seventy-two.

Sec. 716. Every future interest is void in its creation which, by any possibility, may suspend the absolute power of alienation for a longer period than is prescribed in this chapter. Such power of alienation is suspended when there are no persons in being by whom an absolute interest in possession can be conveyed.

Sec. 772. A contingent remainder in fee may be created on a prior remainder in fee, to take effect in the event that the persons to whom the first remainder is limited die under the age of twenty-one years, or upon any other contingency by which the estate of such persons may be determined before they attain majority.

#### SERVITUDES.

Sec. 801. The following land burdens, or servitudes upon land, may be attached to other land as incidents or appurtenances, and are then called easements:

1. The right of pasture;
2. The right of fishing;
3. The right of taking game;
4. The right of way;
5. The right of taking water, wood, minerals, and other things;
6. The right of transacting business upon land;
7. The right of conducting lawful sports upon land;
8. The right of receiving air, light, or heat from or over, or discharging the same upon or over land;
9. *The right of receiving water from or discharging the same upon land;*
10. The right of flooding land;
11. *The right of having water flow without diminution or disturbance of any kind;*
12. \* \* \* \* \* etc., etc.

Section 802. The following burdens, or servitudes upon land, may be granted and held, though not attached to land:

1. The right to a pasture, and of fishing and taking game;

2. The right of a seat in church;

3. The right of burial;

4. The right of taking rents and tolls;

6. The right of taking water, wood, minerals, or other things.

Sec. 803. The land to which an easement is attached is called the dominant tenement; the land upon which a burden or servitude is laid is called the servient tenement.

Sec. 804. A servitude can be created only by one who has a vested estate in the servient tenement.

Sec. 805. A servitude thereon cannot be held by the owner of the servient tenement.

Sec. 806. The extent of a servitude is determined by the terms of the grant, or the nature of the enjoyment by which it was acquired.

Sec. 807. In case of partition of the dominant tenement, the burden must be apportioned according to the division of the dominant tenement, but not in such a way as to increase the burden upon the servient tenement.

Sec. 808. The owner of a future estate in a dominant tenement may use easements attached thereto for the purpose of viewing waste, demanding rent, or removing an obstruction to the enjoyment of such easements, although such tenement is occupied by a tenant.

Sec. 809. The owner of any estate in a dominant tenement, or the occupant of such tenement, may maintain an action for the enforcement of an easement attached thereto.

Sec. 810. The owner in fee of a servient tenement may maintain an action for the possession of the land, against any one lawfully possessed thereof, though a servitude exists thereon in favor of the public.

Sec. 811. A servitude is extinguished:

1. By the vesting of the right to the servitude and the right to the servient tenement in the same person;

2. By the destruction of the servient tenement;

3. By the performance of any act upon either tenement, by the owner of the servitude, or with his assent, which is incompatible with its nature or exercise; or,

4. When the servitude was acquired by enjoyment, by disuse thereof by the owner of the servitude for the period prescribed for acquiring title by enjoyment.

#### **OCCUPANCY.**

Sec. 1007. Occupancy for the period prescribed by the Code of Civil Procedure, as sufficient to bar an action for the recovery of the property, confers a title thereto, denominated a title by prescription, which is sufficient against all.

#### **EFFECT OF TRANSFER.**

Sec. 1104. A transfer of real property passes all easements attached thereto, and creates in favor thereof an easement to use other real property of the person whose estate is transferred, in the same manner and to the same extent as such property was obviously and permanently used by the person whose estate is transferred, for the benefit thereof, at the time when the transfer was agreed upon or completed.

#### **WATER RIGHTS.**

Sec. 1410. The right to the use of running water flowing in a river or stream or down a canyon or ravine may be acquired by appropriation.

Sec. 1411. The appropriation must be for some useful or beneficial purpose, and when the appropriator or his successor in interest ceases to use it for such a purpose the right ceases.

Sec. 1412. The person entitled to the use may change the place of diversion, if others are not injured by such change, and may extend the ditch, flume, pipe, or aqueduct by which the diversion is made to places beyond that where the first use was made.

Sec. 1413. The water appropriated may be turned into the channel of another stream and mingled with its water, and then reclaimed; but in reclaiming it, the water already appropriated by another must not be diminished.



Sec. 1414. As between appropriators, the one first in time is the first in right.

Sec. 1415. A person desiring to appropriate water must post a notice, in writing, in a conspicuous place at the point of intended diversion, stating therein:

1. That he claims the water there flowing to the extent of (giving the number) inches, measured under a four-inch pressure;

2. The purposes for which he claims it, and the place of intended use;

3. The means by which he intends to divert it, and the size of the flume, ditch, pipe, or aqueduct in which he intends to divert it.

A copy of the notice must, within ten days after it is posted, be recorded in the office of the recorder of the county in which it is posted.

Sec. 1416. Within sixty days after the notice is posted the claimant must commence the excavation or construction of the works in which he intends to divert the water, and must prosecute the work diligently and uninterruptedly to completion, unless temporarily interrupted by snow or rain.

Sec. 1417. By "completion" is meant conducting the waters to the place of intended use.

Sec. 1418. By a compliance with the above rules the claimant's right to the use of the water relates back to the time the notice was posted.

Sec. 1419.—A failure to comply with such rules deprives the claimants of the right to the use of the water as against a subsequent claimant who complies therewith.

Sec. 1420. Persons who have heretofore claimed the right to water, and who have not constructed works in which to divert it, and who have not diverted nor applied it to some useful purpose, must, after this title takes effect, and within twenty days thereafter, proceed as in this title provided, or their right ceases.

Sec. 1421. The record of each county must keep a book, in which he must record the notices provided for in this title.

Sec. 1422. The rights of riparian proprietors are not affected by the provisions of this title. (Repealed,

but not affecting rights already vested, March 15, 1887.)

#### **CODE OF CIVIL PROCEDURE.**

Sec. 318. No action for the recovery of real property, or for the recovery of the possession thereof, can be maintained, unless it appear that the plaintiff, his ancestor, predecessor, or grantor, was seized or possessed of the property in question, within five years before the commencement of the action.

#### **CONSTITUTION OF COLORADO.**

For Sections 5 and 8 of Art. XIV, see *ante* p. 191.

No. 201.

*Pepe, Dy. for Haines, for Appts.*  
Supreme Court of the United States,

OCTOBER TERM, 1899.

*Filed Mar. 19, 1900.*

H. C. OSBORNE ET AL.,  
APPELLANTS,

vs.

SAN DIEGO LAND AND TOWN  
COMPANY OF MAINE,  
APPELLEE.

No. 201.

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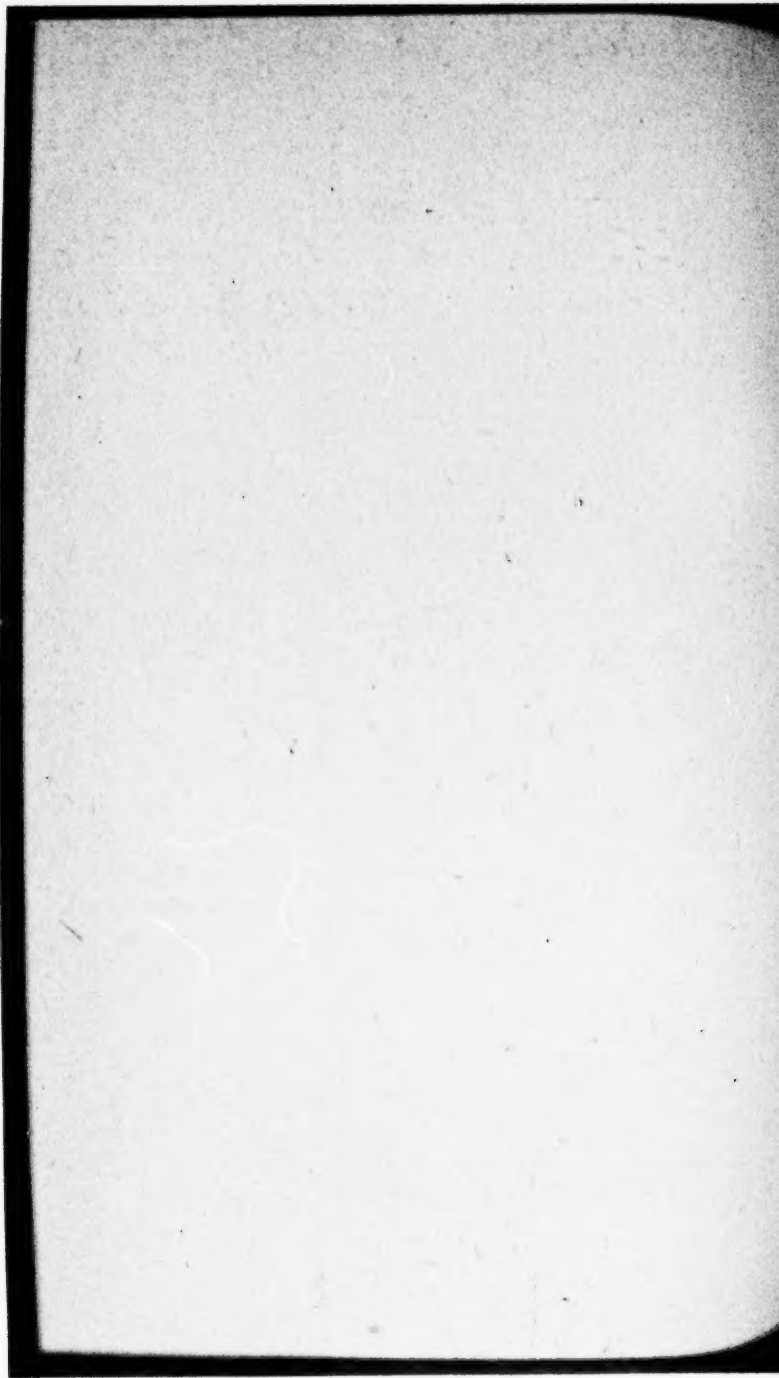
REPLY BRIEF FOR APPELLANTS.

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A. HAINES, Esq.,  
*Counsel for Appellants.*

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1900.



# Supreme Court of the United States.

OCTOBER TERM, 1899.

H. C. OSBORNE ET AL.,  
APPELLANTS,

v.

SAN DIEGO LAND AND TOWN COM-  
PANY OF MAINE,  
APPELLEE.

No. 201.

## REPLY BRIEF FOR APPELLANTS.

Counsel for appellants, in their brief (p. 8), in professed accordance with Sec. 552 of the Civil Code, define each appellant's interest in the water system of the corporation, and also the duty of the corporation collateral to such interest, as follows :

"It is the simple right to the perpetual flow of the  
"water through the company's system ; coupled with the  
"obligation, on the part of the company, to keep its system  
"in such condition and repair as may be necessary to  
"supply the water."

This seems to us a clear recognition of the *jus in rem*  
and *jus in personam*, respectively, the distinction between

which is shown in the authorities cited in our opening brief (pp. 118-121).

Also the Court below, having in view the rights of the appellants, speaks (76 Fed., p. 334) of "the consumer" "whose rights have once vested;" and of his "right to" "the continued use of water which he has acquired as a" "perpetual easement to his land."

Thus the actual ownership by the appellants of their respective vested freehold servitudes on the water system annexed as perpetual easements to their lands, is conceded by the Court, and by counsel for appellee. And we submit that there is no occasion, as seems to be done in the brief for appellee (p. 6), to confound the legal title of the system, which is in the corporation, with the appellants' claim that their perpetual easements are freehold servitudes upon such system. Counsel, however, manifest a fine scorn for the word "easement" and the word "servitude" (Brief, pp. 6-8); and even seem to think that counsel for appellants are attempting to overthrow the State Constitution and statutes by "appalling" refinements and subtleties of argument under those heads (Brief, p. 6). We find, however, no occasion to apologize for seeking to avail ourselves both of the working terminology and the principles settled by the juridical experience of centuries under these titles of the law, in the humble attempt to work out a consistent and rational legal conception of the relations between this and like water companies and the irrigators under their systems. For there is in this state a crying need for such a conception. In this very case the Court below and counsel for appellee differed fundamentally as to how the admitted ownership of the defendants in their perpetual irrigation easements came about; yet a correct idea of this is the key to solve the whole problem.

The Court holds that it could not have arisen contractually, but fails to show how it could have arisen otherwise. Counsel for appellee, however, insist that a water company may legally contract to sell and grant a water right, and this is natural and proper; for it would be disastrous to the corporation to deprive it of the right to sell land and water as one estate, according to the primary purpose of its original scheme; especially since it owns and holds for sale over one-third of the planted and improved lands irrigated under the system (Trans. p. 24), as well as large tracts of improved land. But strangely enough, while saying of the defendants that "*Most of them bought their lands from the company with water, and thus acquired the water right by the application of the water to their lands*" (Brief, p. 4), and that this "One class bought land from the company with water attached" (Brief, p. 7), counsel seem in the same breath to deny that such purchasers either contracted for, or bought, or paid for a water right. We must ask, then, for what did these people pay the company from \$250 to \$500 an acre? For the raw, arid land, worthless without the water? So counsel seem to imply, as, with deference, we think inconsistently, and in disregard of the allegations of the answer, which stand admitted. Counsel seem to say that no one bought a water right under this system until after December, 1892, apparently, because it was only after that date that written forms of contract making specific mention of the water right were adopted by the corporation, either in sales of its own lands, or in annexing perpetual easements of the use of water to other lands (Trans. pp. 21-23). To be consistent, counsel ought also to deny that a water right was paid for in sales of its own lands under the form of contract found at page 21 of the transcript, for there, too, the land and water were bought at one price *in solido*.

But neither court nor counsel can account for these private, perpetual easements, which the original bill, the opinion of the Court, and the arguments of counsel admit to have vested in the defendants, if they reject the principle of grants from the corporation, express or implied.

There is no other way of accounting for them under the present constitution of society, or short of thorough paced Socialism. Counsel for the appellee, on the face of the original bill, is not in position to deny that every one of these water rights was created by grant of the corporation to the respective defendants. Whether such grants were made on the basis of payment down of the full price, set by it, of the easement proper, subject to the payment of \$3.50 per acre, as by far the most were, or whether they were the voluntary grants implied from conduct and made by the corporation subject to the annual rate of \$3.50 per acre, as some were; whether the price of the easement was lumped in with the price of the land sold by the company, or separately paid when annexed to other land, or whether the \$3.50 annual rate per acre was fixed by the corporation in the belief that it would "return its operating expenses and pay it some interest on its investment," as it did in the original bill (Trans. p. 10), or only its operating expenses, does not change the fact that the interests of each of the defendants became a vested property right—a perpetual easement *owned* by him as stated in the bill, and as reaffirmed in the brief for appellee (p. 9).

An offer made by the corporation to a land-owner to furnish him with a perpetual supply of water delivered on his land, if he will pay for the use thereof a rate of \$3.50 per acre per annum, accepted by him, and acted upon by both parties, becomes in the eye of the law just as much a contract relation, and the resulting easement is as much a grant based on contract as is the easement granted for



a price paid for the water right over and above the annual rate.

Counsel manifest a late disposition to discriminate between the owners of the easements (Brief, p. 4) in respect of the question of the power of the corporation to increase water rates *in invitum*. But neither the bill, nor the answer, admits of such discrimination; nor does the rule of classification of lands adopted by the corporation itself (Trans. pp. 47, 48); nor does Sec. 552 of the Civil Code; in fact, that section expressly puts irrigators of land not purchased of the corporation, who have been furnished water by it with which to irrigate their land, upon the same footing as those who have purchased their land from the corporation, thus making the *latter class the standard*.

Indeed, we submit that the main question in this case,—to wit: whether the corporation has the power, *ex mero motu*, to double the actual irrigation rate as established by itself at the time these easements vested, and as collected by it to the date of this suit,—might with entire propriety be judged by taking as a test case the water rights under the form of contract for sale of land and water set forth at page 21 of the record.

POWER TO CONTRACT ABOUT WATER RIGHTS, NECESSARILY  
IMPLIES THE POWER TO CONTRACT ABOUT WATER RATES.

Thus counsel roundly assert in this case, as they asserted for the owner of the same system in the case of *San Diego Land & Town Company v. National City*, 174 U. S. 739, 743-4, that these water rights are lawful subjects of contracts of sale and purchase. Yet at the same time they set for themselves the absolutely hopeless task of proving that there can be no lawful contract respecting

annual rates to be paid the corporation in respect of these same easements, whether merely for maintenance, or for both maintenance and net revenue. Counsel go further, and assert not only that the purchase of the freehold easement at a gross price *paid*, cannot lawfully be accompanied by a contract annual rate to be paid, but also, as a matter of law, "that the acquisition of that water right *has no effect whatever* on the liability of the consumer to pay the annual rates, *or the amount to be paid*" (Brief, p. 7); and again (p. 3) that "whether a contract for a water right was valid or not, *has nothing to do with* the liability of the consumer to pay annual rates, *or the amount to be paid.*"

Counsel have yet to point out a way to reconcile the two positions—that a contract may be made to grant a perpetual easement, but not respecting the maintenance of the easement; to create the water right, but not respecting the water rate; for the creation of the principal thing, but not respecting an incident made collateral to it.

They have also yet to point out on what principle the corporation assumes that it may grant an easement in fee, and still retain the repugnant power to subject it to any new rate it sees fit, to produce net revenue. Such a grant "would be in effect to give and not to give, in the "same breath," in contravention of all recognized principles relating to grants of other interests in real property. *Potter v. Couch*, 141 U. S. 296, 317.

It is impossible to entertain these inconsistent and self-contradictory views, until the state of mind is arrived at, which can seriously say with the brief for the appellee, of the admitted water right of each defendant, that "it makes "no kind of difference in this case *what it is.*"

And that "The question as to the exact nature of the "rights of the appellants and the corresponding duties of

“ the company are (is) *wholly immaterial* and confuse(s),  
 “ rather than aid(s), in arriving at an intelligent and just  
 “ conclusion upon the real and only question presented  
 “ by the issues.”

And this question counsel state to be, whether the corporation has the right and power to double its annual rates as against vested easements.

The Court, however, perceived, and in this respect the appellee seems to differ, that to admit that the perpetual easements of the defendants rest on the basis of contract, must necessarily involve the admission that the rate contemporaneously established, is also contractual. The Court saw, that if a water right can be bought, and has been paid for, this must necessarily affect the annual water rate, in any case where that can be assumed to be left open to be fixed by public authority. For it requires neither “appalling” refinement nor subtlety, to see that it would be an outrage for the “State,” which in this case is made to mean simply the corporation, to compel the irrigator, without his consent, to pay interest as net revenue on the value of the easement, the price of which it has already collected in lump, and covered into its treasury.

So the Court avoided this by simply declaring that the defendants who bought water rights, whether lumped in with the price of the land “with water attached,” or separately from the price of land, paid their money for naught. As far as the practical result under this decree, to the defendants, is concerned, they experience no difference, in the *outcome* to them, between the theories of Court and counsel. They see only this difference, that the theory of the Court makes them melancholy examples, pilloried as warnings to such unthinking persons as might else continue to harbor the delusion that one who buys a water right owns what he pays for ; while the theory of

counsel would still spread the net and the bird-lime for new victims.

The Court, in holding that no contract can be made in California between a water company and an irrigator, respecting either water rights or water rates, is wholly and consistently in error; while counsel is correct as to the former proposition, but both inconsistent and erroneous in the latter.

THE RATE OF \$3.50 PER ACRE WAS FIXED BY CONTRACT  
BETWEEN THE CORPORATION AND EACH OF THE AP-  
PELLANTS.

Counsel are also in disagreement with the Court below as to whether the parties in fact agreed upon the \$3.50 annual acreage rate. The main part of the argumentative portion of the opinion proceeds upon the assumption that the record does show such agreements (76 Fed. R. 334-339); while counsel contend it does not.

The matter in the record bearing upon this fact is found in the bill at the record folios 12-13, and in the answer at folios 27-35, and 39-41.

It is, in brief, that in all cases where the corporation sold land, it sold it with water, at prices enhanced by reason of it, and upon the express representation that the annual rate would be \$3.50 per acre; that where it annexed the irrigation easement to other lands, it did so voluntarily, the terms being fixed by itself, and at the same annual rate established by itself; and that all the defendants were induced to purchase, improve, and settle upon their respective parcels of land in reliance upon such represented and established rate; and that this rate became from the beginning of the service in 1887, down to the commencement of this suit, the "actual rate estab-

lished and collected" by the corporation (Act 1885, Sec. 5).

If there were nothing more in this case than the adoption and public promulgation by the Water Company of a schedule of water rates, including an irrigation rate of \$3.50 per acre per annum, at which it invited people to acquire the perpetual easement of the flow and use of water to their lands, as defined in Sec. 552 of the Civil Code, the acceptance of this offer on the part of land-owners by the application of the water to their land, and by the payment of that rate for years, would be amply sufficient to show a contract for the easement at that rate, making the rate as perpetual as the easement itself, and its constant reciprocal. *Boyd v. Brincken*, 55 Cal. 427; *Southern Pacific Railroad Company v. Terry*, 70 Cal. 484; *Avila v. Pereira*, 120 Cal. 589, 595. These were cases in which a railway company offered by circular issued and distributed, to any one who should settle upon and improve land of the company, to sell it to such person as soon as the company should fix a price upon the same, at the price so fixed. Persons accepted that offer by settling upon and improving the land, and notified the company of their acceptance by filing in its office applications to purchase, as soon as the price should be fixed. It was held that this made an executory contract which would be specifically enforced against the company as soon as the price was fixed. Here in all cases the rate was unconditionally fixed by the company in the first instance; and the use of the water and payment of the rates make the acceptance of the company's offer conclusive.

What is thus true of those who did not buy land of the corporation, is at least as true of those who did buy at the large prices and under the express representations that the established rate was \$3.50 per acre per annum,

put forth as an inducement to purchase. It is also at least as true of those who, under the same representation as to the established rate, paid earlier \$50 per acre and later \$100 per acre for their water rights.

The court in *Boyd v. Brincken*, 55 Cal., *supra*, at p. 429, said :

“ We think that the contract in this case belongs to that group which is said to be ‘ created by representations made by one party, and acts done by the other party, upon the faith of such representations.’ (Pomeroy on Contracts, § 69.)

“ ‘ Where an absolute unconditional representation of something to be done in the future is made by one person, in order to accomplish a particular purpose, and the person to whom it is made, relying upon it, does the act by which the intended result is obtained, a contract is thereby concluded between the parties.’ “ (*Id.*)”

Counsel, in respect of the representations made to purchasers of the company's land, seem to abandon the position that this was not in its nature contractual; and fall back upon the argument of the opinion, that the law forbids the contract (Brief, p. 21).

In respect to the special contracts shown in the answer (pp. 21, 22, 23 of the record), counsel claim that they contain what amounts to *carte blanche* to the corporation to alter and increase the established rate. But it is conceded (Brief, p. 16) that these clauses in the contracts added nothing to the rights already existing in the company by law; and we think this, so far forth, is true; we think with counsel that it is also true, that the clauses respecting rates in the Ballou and Ex-Mission cases, were intended to make the rates of the contracting parties uniform with all other consumers.

What, then, was at the date of the special contracts set forth on pp. 21-23 of the record, the rate referred to in them as the "*regular annual rate allowed by law*" and the annual water rate "*fixed by the first party as allowed by law*," for irrigation? Unquestionably \$3.50 per acre. It is the asserted power to change and double this rate which is questioned and denied here. That power, by the very terms of the contracts, must *be allowed by law*, or it cannot exist. It must be allowed by the universal principles of the law of contracts; it must be allowed by the statutes (which we think harmonize with the power to contract, and if not, so much the worse for the statute), or the power does not exist.

But neither Court nor counsel have been able to point out anything in the statutes which permits this jumping of rates; and as for general principles of law, they deny them any application.

We agree with counsel (Brief, p. 13) that the provision in the latter part of Sec. 5 of the Act of 1885 is just as much a regulation of the rates, as the provision that rates may be fixed by the board of supervisors. We also agree with Messrs. Garber and Short, the *Amici Curiae*, in their statement (Brief, p. 43) as follows:

"All rates established in pursuance of the Act of 1885, whether by the supervisors or by the individual or corporation supplying the water, are merely *maximum* rates."

Our argument under that head is fully presented in the opening brief, pp. 196-210. This, we regret to say, has not received the criticism of counsel for appellee, except in respect of a single remark, found at bottom of p. 209 of *our* brief. (See brief for *appellee*, p. 28.)

The attention of counsel for appellee was there distinctly

challenged to the position that the "*actual rate established and collected*" by the corporation, which in this case "*shall be deemed and accepted as the legally established rate thereof*," is itself a *maximum*; and not a thing to be changed at the pleasure of the corporation, *by an increase forced upon the irrigator.*

The attention of counsel was also explicitly challenged to the position that Sec. 8 of the statutes makes it absolutely certain, that this is the true construction of the provision of Sec. 5, if upon its face it admitted, in reason, of any other, which it does not; for the mandate of Sec. 8 is that the corporation already furnishing water, *shall so furnish at rates not exceeding the rates as fixed and established as provided in the Act, i. e., at the actual rate established and collected by the corporation, which is declared the legally established rate; and that is, under the facts here, the \$3.50 acreage rate, and none other.*

If, as counsel for appellee truly say, the provision of Sec. 5 is just as much a regulation of the rates as the provision that rates may be fixed by the Supervisors, it is also true that Sec. 8 shows that the actual rate by it defined, is just as much a maximum in the one case as the rate fixed by the Board is in the other. That section declares the equiparency.

Yet, we must here note the significant fact, that neither the Court nor counsel make in argument a single allusion to these *maximum* features of the statute; nor does either refer once to the important section 8.

We submit that if the learned Court below had considered and weighed these leading provisions of the statute, it would have found it impossible to reach the decision it did; and that the fact that able counsel, when invited, make no allusion to them, shows that they furnish unanswerable objections to so much of the argument for the



appellee as proffers succor to the decision, after having fatally wounded it, by conceding that it is wrong in holding that in California there can be no uniting of title to land and the use of water, through the sale and purchase of water rights.

It seems proper to point out here that the *Amici Curiae*, after reiterating with entire correctness (Brief, p. 45), that "At most, the schedule rate is a mere maximum, just as "is a rate fixed by the supervisors," fall into an inadvertency in their succeeding statement, viz:

"The only difference being that the supplier can change the schedule at will, which cannot be done with the "other rate."

For how a schedule maximum, which the compensation is forbidden to exceed, either as against vested easements (Sec. 5), or as a condition to granting new easements (Sec. 10), can be avoided by simply changing the schedule, is not explicable. It would be tantamount to saying that the corporation, though *forbidden* to exceed the maximum, *can* exceed the maximum, by the device of *increasing* the maximum, which, as the human mind is constituted, seems to be a contradiction in terms.

A schedule rate for railway transportation from San Diego via Chicago to New York, when accepted by the shipper or the passenger, becomes a *through* contract; therefore the railway company, on the arrival at Chicago, is not permitted to increase the schedule rate against the other contracting party for the remainder of the journey.

Sec. 522 of the Civil Code is a distinct notice to the parties that the subject of their contract is a perpetual easement; and that the rate partakes of the same quality; therefore the corporation is not at liberty to change, *ex parte*, at its pleasure, the terms of this permanent engagement, for it also is very decidedly a through contract.

## II.

Counsel say (p. 21 of their brief) that it is inconceivable that it should have been intended by the law-makers that there should be no relief for a company that had once fixed a rate, that must result, if not changed, in the absolute financial ruin of the company; for this, they say, would result in the ultimate defeat of the purpose sought to be accomplished, and deprive the consumers of the service to which they had become entitled. To this we reply that there may arise cases where the rate established by the corporation is so low that it will not suffice to pay the reasonable annual costs of repairs, management, and operation. But that is not *this* case. Counsel refer to the allegation in the bill that at the rate of \$3.50 per acre per annum the company cannot pay its operating expenses, and is losing money. But the answer denies this. (Record, folio 42.) And its denials are to be taken as true. And it avers that the books of the corporation showed, as early as January 1, 1894, a large net surplus from the rates to the credit of the water system (record, folio 38); and avers that when the bill was filed only one-half the capacity of the system was in use, and shows that the unemployed part had to be maintained for the benefit of the unimproved lands of the company, which contributed nothing to the alleged amount of the annual rental (record, folios 42, 38). Also, that under the circumstances, the income for the year ending January 1, 1896, just before the filing of the bill, was \$25,715, and the utmost stretch of expenses were not to exceed \$12,034.99.

If there is any decision anywhere which justifies the including the interest on the bonded debt of the corpora-

tion in this case, as part of the operating expenses, as claimed by counsel, we do not see it cited. This Court surely did not so hold in the case of *San Diego Land and Town Company v. National City*, 174 U. S. 739, 757. In the State of California just the contrary is held.

In *Redlands, etc., Water Co. v. San Diego*, 118 Cal. 556, it was held :

“The interest upon the indebtedness of the Water Company is not a proper item of expenditure to be provided for in fixing the annual rates to be charged or collected for furnishing water to the inhabitants of the city, and that a water company is not entitled to have the rates so fixed as to enable it to set apart a certain amount each year as a sinking fund for the depreciation of its plant. The provision of the judgment herein, directing that the rates be fixed so as to assure an income sufficient to pay these items, is inconsistent with the principles declared in the San Diego case.”

Not even on the facts stated in the bill can this contention of counsel, that the rates do not pay operating expenses, be supported, as we have shown in the opening brief (pp. 243-246). And it certainly cannot be supported under the tenor of the answer. If this company became embarrassed, it must be remembered that the answer shows that it is under the expense of attempting to carry on over 1,500 acres of citrus orchards ; also that it owns and operates a railroad, and has been carrying on other branches of business specified in its articles of incorporation. These things, and not the water system, caused its deficits.

But counsel declare it a waste of time to discuss the reason or necessity for making the change (Brief, pp. 18-19). We quite agree that inasmuch as the Court below “wasted” no time on what counsel consider so “immaterial” a mat-

ter as any reason for change of the rates ; and as counsel truly say (Brief, p. 30), gave no decree thereon ; and since the Court struck out as impertinent nearly every allegation in the answer bearing thereon, there is no conclusion of the Court upon any reason for increase of rate to be reviewed here.

The only question to be considered is whether the corporation have the arbitrary power *without reason* to double the rate, and shut off the water from the whole community to enforce it. The theory of counsel is that to oppose such power as is asserted for the corporation in the bill, "*the one and only thing that could have been a sufficient answer*" was "that the appellants, or others competent to do so, had applied to the Board of Supervisors and had rates fixed." (Brief, p. 26.)

The frankness of counsel simplifies the discussion, and causes surprise that so much was alleged in the bill. We make no further comment beyond such as is contained in the opening brief on this phase of State regulation, acting through the corporation as its vicegerent, and so the *politi al superior* of the irrigators. But, returning to consideration of the meaning and policy of the statute of 1885, let there be granted, for the sake of the argument, the abstract possibility that a water company, for any imaginable reason—ignorance, mistake or over-anxiety to attract settlers under its system, to use its water, either as purchasers of its land or otherwise, or what not—might fix an irrigation rate too low to maintain the system after it is fully in use.

Does the statute undertake to insure the corporation against any such contingencies by making it immune against its contracts, and by bestowing upon it the arbitrary power to change and increase its rates and to dictate to the Courts to issue their injunctions and decrees to en-

force the demanded increase, without so much as allowing the inquiry whether there was any reason for the change? Or, does the statute consider that a conditional right given to not less than 25 inhabitants and tax-payers to apply to a Board of Supervisors to make future rates, is a panacea for all the possible wrongs and exactions which a water company may perpetrate meanwhile under this irresponsible grant of power. We most respectfully submit that this is not the law as written.

### III.

#### THE QUESTION OF PUBLIC POLICY.

The question of public policy affecting the controversy here, with which this statute of 1885 deals, is whether, because of the chance that water companies may make improvident contracts about perpetual rates for perpetual easements, all water companies should be exempted from the contract status and vested with the arbitrary power to jump up rates, as here claimed. It is, at the bottom, a question between a social condition based on freedom and one based on paternalism. Even freedom has its inconveniences; but we think that the statute recognizes the chance of the making of improvident contracts as the lesser of the two evils, and so contemplates that the corporation may obligate itself by a contract rate, notwithstanding this chance; that such contracts may be made through the acceptance of water for irrigation at a schedule rate adopted by the corporation; and that in such case the law makes this a legal established contract rate, which the corporation cannot exceed against the will of existing irrigators; and that the statute even excludes a corporation from the right to invoke the power of the

Board of Supervisors, so far as it extends to change this schedule rate.

If, in any case, it should turn out that this rate is not sufficient to maintain the system, still, as to all who have become irrigators under it, and whose rights have vested, it remains a contract rate which the corporation cannot disturb without their consent.

And since these owners of servitudes in a water system have a most direct and proprietary interest in having the system kept in repair, the policy of the law is to leave it to their instinct of self-preservation to make such new terms with the corporation as will, in their judgment, effect this object, if the old terms fail of the purpose.

In other words, the policy of the law is to leave the balance of power to effect any increase of rates with the irrigators, and not with the corporation.

It seems to us that this is the very essential principle of the curb and check which the law has provided against the abuse of the natural monopoly which corporations have in their control of the water supplies for irrigation in an arid region—for it is, indeed, and in the nature of things *the power of the keys*. Permanent contracts for rates have been common under the older irrigation canals, in the State of California; as, for example, in the cases cited in *San Diego Land and Town Company v. National City* (174 U. S. 739, 758). So, also, in Europe. For example, in the case of the Bourne Canal in France, it is said in Hall's *Irrigation Development*, Part 1, pp. 88-89, that the conditions of the concession from the Government in respect of benefits to the grantee company included the following:

“1. The authority to collect water rents for the term of “99 years, as follows:

“ *For Irrigation:* From all who subscribe before  
 “ water is put in the main canal, for a fixed amount  
 “ of water annually, at the rate of 50 francs per liter  
 “ (\$269 per cubic foot, at most \$3.27 per acre per  
 “ season) of discharge per second during irrigation.  
 “ From all who subscribe after the water is put in  
 “ the main canal, at the rate of 60 francs per liter (\$323  
 “ per cubic foot) (at most \$3.92 per acre per season)  
 “ of flow, etc.”

In this connection we take the opportunity to call the attention of the Court to a recent paper by a Mr. L. M. Holt, entitled “Irrigation Development,” which contains, as we think, a reliable and interesting historical sketch of irrigation development in California, and made by a very competent and experienced student of the question. Copies of this we shall ask the privilege of leaving with the clerk for the use of the Court.

But, without further enlarging on the public policy evinced by the statute, and without going into the question of the functions and limitations of the Boards of Supervisors under the Act of 1885, we submit that the *lex scripta*, applicable to the facts here, is plain and unmistakable; and that considered together, the Act of 1876 (Sec. 552 of the Civil Code), the sections 5 and 8 of the Act of 1885, and the Act of 1897 declare with recurring and progressive emphasis that a water company shall not have the power to depart from the fundamental representations which it made, by word and by deed, as to the cost of water supply for irrigation, under which it sold its lands, and attracted a population from all the civilized parts of the earth to settle in what, without water, is and has been a desert since the waters of the sea gathered themselves together and uncovered the land.

## QUESTIONS OF PRINCIPLE.

*Exceptions to Answer for So-called Impertinency and Insufficiency.*

Counsel for appellee (brief, p. 24) takes the position that if the Court below was right in holding that irrigation rates cannot be fixed by private contract or by estoppel, through representations or by prescription, and that irrigators in such case as this have no judicial remedy against any change of rates by the corporation, and the forfeiture of the water supply to enforce them, then that it necessarily follows, that all the allegations in the answer relating to these defenses were both impertinent and insufficient.

We think, in point of practice, that the question of the validity of these defenses is not properly and regularly raised by proper exceptions, either for impertinency or insufficiency. This question, as respects exceptions for impertinency, was sufficiently discussed in the opening brief (pp. 253-5).

And the use of the exception for insufficiency to try the validity of such defenses, is, of course, a misconception of the office of such an exception. Indeed, the argument of counsel in this respect aids our contention that the real intent and proper effect of the third, fifth, and sixth paragraphs of the supposed exceptions amount to the setting down and submission of the cause on bill and answer, and that they are misnamed exceptions for insufficiency.

The other arguments of the brief of appellee have been anticipated and discussed in our opening brief.

And, in conclusion, we respectfully submit that the case is here for final disposition as submitted in our opening brief.

A. HAINES,  
*Of Counsel for Appellants.*



IN THE  
Supreme Court of the United States  
October Term 1899.

No. 201.

H. C. OSBORNE, ET. AL.,	}	
Appellants,		
vs.		
SAN DIEGO LAND AND TOWN	}	
COMPANY,		
Appellee.	}	

BRIEF OF APPELLEE.  
STATEMENT.

We have read the very able and exhaustive brief of Counsel for appellant with great interest and pleasure. As a dissertation on abstract questions of law it is worthy of careful study and consideration by those who desire to arrive at a just solution of the many serious and important questions relating to the rights of water companies and their consumers in California. But most of the questions so ably discussed by counsel are not presented by the record in this case directly or indirectly, and are purely theoretical, and for that reason only tend to confuse the one and only question here presented for review. We shall not attempt to follow counsel in their elaborate and extended argument upon many of the important questions first raised by their brief for the purpose of discussing them, for the reason that no decision of them is called for in this action and none could very well be given because they are mere theories of the most visionary and impracticable kind. There is but one question presented by this appeal, and that a very simple one, viz.:

*"Has a water company, where rates have not been*

*fixed by the Board of Supervisors the right and power to change and fix its own annual rates."*

This question, we believe we will be able to show, is not affected in the least by the other questions so elaborately discussed by counsel; whether a valid contract can be made by and between a water company and a consumer of water for a "*water right*" or whether a water right acquired by a water consumer is an easement on the system of the company or not. We may say at the outset that we agree with counsel for appellant that a water company may legally contract with a water consumer for a water right to water to be applied to and made appurtenant to lands owned by such consumer, and that such water right, so acquired, and applied to lands, is the perpetual right to receive the amount of water covered by such water right and use it upon the lands to which it has thus become appurtenant. And, further, that such right vests in the consumer the right to prevent the company from selling other water rights, or supplying water, beyond the supply of the company, or duty of its system, and thereby diminishing the quantity of water to which such consumer is entitled under his water right.

Therefore, the sole and only question between us is this:

The consumer having acquired his water right *on what terms* is he entitled to receive the water under that water right?

The appellants concede that they cannot demand the water for nothing because they have acquired the water right. But they contend that they are only bound to pay such rates as will meet the operating expenses of the system and keep it in repair, and not such as will return the company any profit. The position of the appellee is that the water right acquired by the consumer vests in him the perpetual and preferred right to the water *on the payment of the annual rates fixed and established as provided by law*

that such rates must be fixed as will yield to the company a reasonable return on the value of its plant and system; that until the consumers or other citizens of the county have caused the rates to be fixed by the board of supervisors, as provided by law, the company itself may establish and re-establish the rates, subject always to the right of twenty-five of the consumers or other citizens of the county to fix and establish such rates. The court below so held.

Lanning v. Osborne, 76 Fed. Rep., 319.

But the court went farther, and decided that the water company had no power, under the constitution and laws of the state of California, to contract with a consumer for a water right and that the consumer was entitled to demand and receive the water on payment or tender of the annual rates, fixed as provided by law.

The decision of this question was not necessary to the decision of the case and was not raised by either party to the suit. If the court below was right in this conclusion its determination that a contract for a water right did not affect the liability of the consumer to pay the annual rates, or the amount of such rates is unquestionably right. But such determination, as we think we shall show, was not necessary to the ultimate conclusion reached by the court. Whether a contract for a water right was valid or not has nothing to do with the liability of the consumer to pay annual rates or the amount to be paid.

Again, counsel have presented their brief on the theory that a company and its consumers may fix and establish the *annual rates* by contract between themselves. We shall maintain that this cannot be done under the laws of California and farther, that it is entirely immaterial in this case whether it can be legally done or not because no such contract was made or attempted to be made between the parties to this suit, or any of them. In every instance where

water rights were conveyed by contract it was agreed, in substance, that the owner of the water right thus acquired was to pay, in addition to the amount paid by him for the water right, all annual water rates and charges for the water fixed by the company as allowed by law.

Record, pp. 21, 22.

Lanning v. Osborne, pp. 326, 327.

These contracts not only recognized the legal right of the company to fix, establish and change its water rates, but in express terms agreed to pay the annual rates fixed by the company in addition to the amount paid for the water right.

Again, it must not be overlooked that only a small number of the defendants contracted, or paid for water rights. Most of them bought their lands from the company, with water, and thus acquired the water right by the application of the water to their lands; many of them, owning lands not purchased from the company, acquired water rights by the supply of water to their lands by the company without the payment of anything for the water right.

That a water right, vesting in the land owner the right to the perpetual use of the water on his lands, may be acquired, is expressly provided by statute in California.

Civil Code, Cal., Sec. 552.

Therefore, whatever may be said in favor of the small number of defendants that paid anything for their water rights, in respect of their claim to have water supplied to them at reduced annual rates because they paid something for their water rights, there can be no pretense that any such claim can prevail as to those defendants that obtained their water rights without any consideration. And as to such defendants as did pay for their water rights, no such claim can be successfully made for them, as above stated, because they expressly agreed to pay the rates fixed by the company, in addition to the amounts paid by them for their

water rights and because they are bound to pay such rates independently of any such contract.

We shall maintain, therefore:

1. That the amount paid for a water right is paid for that preferred right to the perpetual use of the water *at the annual rates fixed as provided by law.*

2. That in this case no contract relieving the consumers from their statutory liability was made, but the contracts all recognize such liability and confirm it in terms.

3. That the company in the absence of action by the supervisors has the right and power to establish, change and re-establish its own rates, subject always to subsequent action by such board.

4. That no contract of the parties or representations of the company can have the effect to modify the statutory mode of fixing the rates, or abrogate the power of the company or the supervisors to fix such rates.

5. That if the company establishes unreasonable or unsatisfactory rates the only and exclusive remedy is an application to the board of supervisors to establish rates as provided by the statute.

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#### ARGUMENT.

#### WHAT RIGHT WAS VESTED IN THE DEFENDANTS BY THE ACQUISITION OF A WATER RIGHT?

Assuming, for the purposes of this case, notwithstanding the decision of the court below to the contrary, that there is such a thing as a water right, subject to sale and conveyance by a water company selling and distributing water to the public, the first question to be considered is what right is vested in the consumer by the acquisition of this right from the company, and what effect does its acquisition have

upon the duty or liability of the consumer to pay the annual rates for the water fixed as provided by law.

Shorn of the refinements and subtleties of the argument of counsel for the appellant, their position is simply this: The consumer by purchasing, or otherwise acquiring a water right to a part of the water held by the company for sale and distribution, becomes the *owner* of that proportion of the *system* of the company that his water right bears to the whole amount of the water the company is able to supply by its system, and that, when water rights have been acquired for all of the water the system can supply the consumers *own the whole system*, and, therefore, by purchasing the water right the consumer becomes a joint owner of the system and is not bound to pay rates such as will return any compensation for the use of the plant or the water, but only such rates as will keep the plant, *the property of the consumers*, in repair and operate it.

Counsel may sugarcoat this claim, and conceal its effect by calling the right an "easement" or "servitude," or what not, but that is their claim plain and simple. And the amount of argument and refinements and subtleties counsel have resorted to to sustain this most remarkable and hitherto unheard of position, that must overturn and abrogate the constitutional and statutory provisions in this state, enacted for the very purpose of protecting the consumers of water by giving the state power to regulate the price at which water shall be furnished by water companies in their long and labored brief, is appalling.

As opposed to this contention of counsel we maintain that a water right is the preferred and perpetual right of a consumer to have a certain quantity of water supplied to his lands *at the annual rates fixed as provided by law* and that the acquisition of that water right has no effect whatever on

the liability of the consumer to pay the annual rates, or the amount to be paid.

In this case, as we have said in our opening statement, there are three classes of consumers taking water from the system of the appellee. One class bought land from the company, with water attached, without buying a water right; another class bought and paid for a water right, and still another class obtained a water right without paying any consideration therefor, directly or indirectly, by having the water supplied to their lands.

The contention of counsel is that the small number of consumers who bought water rights are not bound to pay rates that will pay the company any profit, that the law of the state requires that all annual rates shall be uniform, and therefore, *none* of the consumers can be charged with such rates.

The law does not contemplate, nor will it countenance, a doctrine so utterly unjust and unreasonable. The code of the state provides:

"Whenever any corporation, organized under the laws of this state, furnishes water to irrigate lands which said corporation has sold, the right to the flow and use of said water is and shall remain a perpetual easement to the land so sold, *at such rates and terms as may be established by said corporation in pursuance of law.* And whenever any person who is cultivating land, on the line and within the flow of any ditch owned by such corporation, has been furnished water by it, with which to irrigate his land, such person shall be entitled to the continued use of said water, upon the same terms as those who have purchased their land of the corporation."

Civil Code of Cal., Sec. 552.

This section was in force when the present constitution was adopted and is still in force.

It will be seen that when water is once supplied to land the right thereto, or the "water right," at once attaches and becomes appurtenant to the land, and the right is to the

continual and perpetual use of the water "*at such rates and terms as may be established by said corporation in pursuance of law*. The appellants' rights, and their interest in the appellee's plant, are clearly defined by this statute, and are easily understood. It is the simple right to the perpetual flow of the water through the company's system, coupled with the obligation, on the part of the company, to keep its system in such condition and repair as may be necessary to supply the water. It may be called an easement, as it is called in the section cited, or what not. There is nothing in the name. That is their right, plain and simple. But it makes no kind of difference in this case what it is. It is a right that is conditioned upon paying an annual rental or rates for the water furnished; or, if counsel prefer it, for the services of the company, and the use and wear and tear of its plant in supplying the water. *And this rate is the sole and only thing in controversy in this case*. Therefore, all of their fine-spun theories may be important in an educational way, but the question as to the exact nature of the rights of the appellants and the corresponding duties of the company, are wholly immaterial and confuse rather than aid in arriving at an intelligent and just conclusion upon the real and only question presented by the issues. For this reason, without intending any discourtesy to counsel on the other side, we shall not weary the court by any attempt to follow them in their elaborate brief of questions that we believe are entirely foreign to any issue presented by this appeal.

The extended argument of opposing counsel is the result, we presume, of the decision of the court below that there was no such thing as a water right in the appellee, and that therefore it could not convey one. But the court below was not called upon to rule upon any such question and the decision rendered upon that point is immaterial to the matter in controversy. The bill not only conceded, but alleged, in



terms, that the defendants were the owners of water rights, as follows:

"That each of said defendants has by purchase or otherwise become the owner of a water right to a part of the water appropriated and stored by said company necessary to irrigate his tract of land, and is liable to pay for the use of said water a yearly rental, such as said company is entitled to charge and collect."

Record, p. 9.

The question is, whether, having acquired the water right they are still bound to pay reasonable annual rates for the water they use.

There is the further question that we will come to farther on, viz., "*by whom may the annual rates be fixed and how?*"

Under section 552 above quoted, we submit, there can be no question but that the owner of the water right is bound to pay the rates established by the company and that his right was subject to such payment. Let us see then what changes have been made in the law since Section 552 was enacted, and what effect they have on the rights, obligations and liabilities of water companies and their consumers.

The constitution of the state provides:

"The use of all water now appropriated, or that may hereafter be appropriated for sale, rental or distribution, is hereby declared to be a public use and *subject to the regulation and control of the State in the manner to be prescribed by law.*"

And again:

"*The right to collect rates or compensation for the use of water supplied to any county, city and county or town or the inhabitants thereof is a franchise and cannot be exercised except by authority of and in the manner prescribed by law.*"

Const., Art. XIV, Secs. 1, 2.

These constitutional provisions undoubtedly confer upon

the state the power to regulate the price to be charged for the use of water.

Spring Valley Water Works v. Schottler, 110, U. S. 347;

San Diego Land and Town Company v. National City,

174 U. S. 739, 753;

San Diego Water Co. v. City of San Diego, 118 Cal. 556.

The right of the state to regulate the sale and distribution of water by Companies of this kind being established, and the constitution having declared the use of water to be a public use, subject to regulation "in the manner prescribed by law," and that the right to collect rates is a franchise that cannot be exercised except as "prescribed by law," we must next inquire what has been prescribed by law in the way of regulating the use, sale and distribution of water. This becomes necessary because counsel contend: 1. That notwithstanding these constitutional provisions, and statutes enacted in pursuance of them, water companies and their consumers may, by private contracts, determine how this franchise shall be exercised and thus take away, entirely, the power of the state to regulate and control it as prescribed by law; and, 2. That if a water company when it commences the business of supplying water establishes a rate for irrigation, that rate must stand forever, however unjust or unreasonable it may be, or however ruinous to the company, unless twenty-five citizens see fit to appeal to the state authorities to change the rate. If this be so then the company and its consumers can, by their own acts, abrogate the constitution and statutes of the state and take away absolutely and forever the power of the state to regulate the sale and distribution of water. 3. That in this case the company is estopped to increase its rate because it sold lands on the representation that water would be furnished at \$3.50 per acre per annum.

Following the adoption of the constitution vesting in the

state the power to regulate the sale and distribution of water two statutes were enacted in pursuance of its provisions.

Stats. of Cal., 1881, p. 54;

Stats. of Cal. 1885, p. 95.

The first of these statutes applies only to the fixing of rates, annually, in cities and towns. It applies, also, to "cities and counties," to include San Francisco, which is a city and county government in one. This statute has nothing to do with the fixing of rates by boards of supervisors for the irrigation of lands outside of cities and towns. To cover such rates the latter of the statutes above cited was enacted, and by the latter statute this case must be controlled. To arrive at a correct determination of the questions involved here this statute may properly be considered with some care.

It should be remembered that before the passage of this act, the power to fix rates rested solely in the water company supplying the water, by virtue of Civil Code, Sec. 552, and the water right acquired by a water consumer was subject to the payment of rates so fixed. This might result in the imposition of oppressive rates from which no relief was provided by statute. In this condition of things, and for the protection of such consumers, the statute of 1885 was enacted. It provides, as follows:

"The use of all water now appropriated, or that may hereafter be appropriated, for irrigation, sale, rental, or distribution, is a public use, and the right to collect rates or compensation for use of such water is a franchise, and except when so furnished to any city, city and county, or town, or the inhabitants thereof, shall be regulated and controlled in the counties of this state by the several boards of supervisors thereof, in the manner prescribed in this act."

Stats. Cal., 1885, p. 95, Sec. 1.

This provision is followed by others authorizing boards of supervisors to fix and establish the rates upon the petition of "not less than twenty-five inhabitants who are tax-payers of any county," and fixing the basis upon which the rates

shall be made and the amount to be returned to the company thereby, "not less than six nor more than eighteen per cent upon the value" of its plant and system.

Stats. 1885, pp. 95, 96, Secs. 2-5.

It will be observed that the right to call for the fixing of rates is given to the consumers and other inhabitants and tax-payers alone. No such right is given to water companies.

For this reason, doubtless, and because the power to fix and change its own rates already rested with the company, by virtue of Section 552, of the Civil Code, above quoted, this further provision is contained in the statute:

"And until such rates shall be so established, or after they shall have been abrogated by such board of supervisors, as in this act provided, *the actual rates established and collected* by each of the persons, companies, associations and corporations now furnishing, or that shall hereafter furnish appropriated water for sale, rental or distribution to the inhabitants of any of the counties of this state, *shall be deemed and accepted as the legally established rates therefor.*"

Stats. Cal., 1885, p. 97, Sec. 5.

It must be evident, from these provisions of the statute, that until action is taken by the board of supervisors, at the instance of inhabitants of the county, who alone can petition therefor, the power to regulate the rates is vested in the company as provided by the code. And this power is subject, only, to the action of the board of supervisors in the manner provided by the statute.

But, notwithstanding these plain provisions, counsel claim 1st, that the rates may be irrevocably fixed by the parties immediately concerned, viz.: the company and its consumers, by private contract between them, and, 2nd, that the company having once established a rate its power is exhausted and the rate so established by it must stand forever unless some one else, over whom it has no power or control, shall

procure the rate to be changed by the board of supervisors.

Let us examine these two propositions briefly:

(a) *May the rates be established by contract.*

That the state may regulate the sale, rental or distribution of water must be taken as definitely and finally settled. And this regulation extends to the fixing of the rates at which the water shall be supplied. The state *has* prescribed such regulations. The statute provides two ways in which rates may be established, viz.: by the company and by the board of supervisors. The provision that until the board of supervisors fixes the rates and after it has abrogated them the rates established and collected by the company "*shall be deemed and accepted as the legally established rates therefor*" is just as much a regulation of the rates and the manner of fixing them as the provision that the rates may be fixed by the board of supervisors, and when fixed by the board shall be binding until abrogated. The statute provides, in unqualified terms, that the rates fixed in either of the ways authorized by it *shall be accepted as the "legally established rates."*

Then, we ask, how can the rates be fixed and established in any other way? It is impossible that this should be so. If it is so the power of the board of supervisors may be entirely abrogated and taken away, at the will of the company and its consumers. But it must not be overlooked that the right to call upon the board of supervisors does not rest with the parties taking water from the company, alone. It is a matter of public concern and the right to move in the matter is given to any twenty-five inhabitants and tax-payers. Such inhabitants, not takers of water, may desire to become such and to have the rates so fixed as to warrant them in applying for the use of water. And, aside from this, the statute provides for but two modes of fixing the rates, as we have stated, and that such rates shall always be open to change in

such way as to make them at all times reasonable and just.

Further, the statute provides, in terms, that the rates established shall, as to each class of purposes for which the water is to be furnished, "*be equal and uniform.*" And it is absolutely essential that the rates shall be uniform as to all consumers taking water for like purposes. If the right to fix the rates by private contract exists, the rates may be made different in each case and for each person contracted with, which would be in violation of the very essence and spirit of the law.

But it seems to us to be wholly unnecessary to dwell upon what is the evident purpose and intent of the legislation of the state on this subject. It should be enough to say that the asserted right to fix the rates by private contract is in direct opposition to the plain and unequivocal terms of the constitution and statutes. The reasoning of the learned judge of the court below on this branch of the case is unanswerable.

Lanning v. Osborne, 76 Fed. Rep. 336-339.

*(b) No contract fixing or attempting to fix rates, was ever made between the appellants, or either of them, and the appellee.*

We have, under the last preceding subdivision, argued the question upon the assumption, indulged in by opposing counsel, that the appellee did make some contract respecting the rates to be charged by it. But in fact no such contracts were ever made. On the contrary, the parties acted upon the theory, in making their water right contracts, that the rates for the water to be furnished must be established as prescribed by law. The answer of the defendants, to which exceptions were sustained, set up three forms of contracts made

by the appellee with certain of its water consumers, for water rights.

Record, pp. 21, 22, 23.

Lanning v. Osborne, 76 Fed. Rep., 326, 327.

In none of these contracts, and none other is alleged to have been made, did the parties assume or attempt to fix or control, in any way, the rates to be paid. Not only so, but in each instance they recognized the right of the company to fix the rates and obligated themselves to pay the rates so fixed.

In the general form of water right contract set up in the answer the consumer bound himself to pay a certain sum for the water right and with respect to the annual rates, obligated himself as follows:

"And he will promptly pay all *annual water rates and charges* for the water to which he is entitled under and by virtue of this agreement, *at rates fixed by the party of the first part as allowed by law*, and at the times, in the manner and according to the rules and regulations made and adopted by the party of the first part."

Lanning v. Osborne, 76 Fed. Rep., 326.

In the case of J. M. Ballou the agreement was to pay the *current rate therefor as established for Chula Vista*, which was covered by the general contract above alluded to.

Same, p. 327.

In the case of the 400 acres in the ex-Mission the contract was to "*pay for the use of the water at the current rates as may be enforced from time to time for supplying lands in National Ranch and subject to the same general rules and regulations.*"

Same, p. 327.

National Ranch was a part of the territory covered by the system of the appellee and includes Chula Vista. The purpose of these two special contracts was to make the rates

of the contracting parties uniform with all other consumers of the company.

We submit that not only is it not true that there was any contract which could be so construed as to prevent the appellee from collecting the rates fixed by it, but that it was expressly and in terms agreed, in every instance, that the company should fix the rates and the consumer would pay them in addition to the amount agreed upon to be paid for the preferred right to the water.

It must be conceded, in our view of the law, and the view taken of it by the court below, that this clause in the contract added nothing to the right already existing in the company by law. It had the right and power, in the absence of any action by the board of supervisors, to fix its own rates and the consumers were bound to pay them until the board of supervisors did establish rates. But the clause very effectually disposes of the claim of counsel that the purchase of and payment for the water right had the effect to reduce the amount to be paid as annual rates for the use of the water. Not only is it true that such an agreement could not have that effect, as matter of law, if nothing had been said in the contract on the subject, but the parties actually contract in express terms that it shall not have any such effect, but that in addition to the amount agreed to be paid for the water right the regular annual rates fixed as provided by law shall be paid.

*(c) The rate of \$3.50 established by the Company was subject to be changed by the company.*

The contention of counsel is that the company having once established the rate of \$3.50 per acre per annum, its power was thereby exhausted and the company could not change the rate, however disastrous it might be to the company or unjust to the consumers. The allegations of the bill are that the company established this rate under the



advice of its engineer that the system would supply twenty thousand acres of land, but that actual experience had demonstrated that the duty of the system was not in excess of seven thousand acres.

Record, p. 10.

The allegation of the answer is that the system will supply about nine thousand acres.

Record, p. 16.

The bill further shows that at the rate of \$3.50 per acre the company cannot pay its operating expenses, but is constantly losing money.

Record, p. 10.

The policy of the law is that a company of this kind shall receive reasonable rates.

Spring Valley Water Works v. San Francisco, 82 Cal. 286;

San Diego Land and Town Company v. National City, 174 U. S. 739.

The cases cited relate to the rates to be fixed annually in cities and towns, where the law does not provide what amount of revenue shall be returned to the company by the rates. In this case the statute, by its terms, provides just what shall, as matter of law, constitute reasonable rates. The bodies fixing the rates are positively required to so fix them as to return to the company net annual receipts of not less than six nor more than eighteen per cent on the value of its plant.

Stat. 1885, p. 96, Sec. 5.

This court has lately held, in a case involving the rights of this same company, that the rates must be based upon the present value of the plant of the company and the value of the services to the consumers, taking into account the cost of the plant, the cost per annum of operating the plant, including interest paid on money borrowed and reasonably

necessary in constructing the same, and the annual depreciation of the plant.

San Diego Land and Town Company v. National City,  
174 U. S. 739, 757.

The bill here alleges that the appellee's plant cost it \$1,022,473.54; that its annual operating expenses, including interest on \$300,000 of outstanding bonds, and not including the depreciation of its system, is \$33,034.99; and that its total income from all sources, outside of National City, is \$13,000, and from National City \$10,715, making the total receipts \$23,715.00, as against operating expenses and fixed charges of \$33,034.99, or a net loss per annum of \$9,319.99.

The answer alleges that the value of the plant used for supplying water for irrigation is of the value of \$300,000; that the receipts of the company were \$25,715.00, that its operating expenses were not to exceed \$12,034.99, excluding the interest on its bonds. This would leave the company, according to the allegations of the answer, but \$13,680.01 with which to meet the interest of \$21,000 per annum that it was compelled to pay as interest on its bonds. And this does not cover its loss by the depreciation of its plant, that must be made good to save the company from loss. The statute, as we have shown, provides that the company shall be allowed not less than six per cent, net, on the value of its plant. Taking the figures of the answer putting the value at \$300,000, which is unreasonably low, six per cent would be \$18,000. The operating expenses, admitted in the answer, were \$12,034.99. The amount to which the company would be entitled at the lowest rate permitted by the statute would be \$30,034.99. And the company is paying \$21,000 as interest on its bonds that is not met by the rates received. It appears, therefore that there was an absolute necessity for a change in the rates of the company.

But it seems to us to be a waste of time to discuss the

reason or necessity for making the change. It is so perfectly evident that the law contemplates that the company shall have the right to make and change its rates as to make any such discussion unnecessary and idle. As we have seen the code and the statute give the company this right, and the statute provides that until the board of supervisors establishes a rate, and after it has abrogated a rate once established by it, the rates established and collected by the company shall be the legal rates. The law clearly contemplates that it will be necessary to change and re-establish rates from time to time, however they may be fixed. Therefore it is provided by the statute that at any time after one year either the company or citizens and tax-payers may petition to have the rates changed.

Stat., 1885, p. 97, Sec. 6.

The reason for this is evident. The rates must be fixed, as this court has held, on the present value of the plant.

San Diego Land and Town Company v. National City,  
174, U. S. 739.

The value of the plant, and the cost of operating it, may and necessarily does, change materially from year to year. And as the courts have construed the statute as requiring the fixing of rates on the basis of present value, the provision of the statute that the rates may be changed at intervals of not less than one year is obviously in harmony with the general purpose of the law. And it is just as obvious that the intention of the law is that until the rates are fixed by the board of supervisors the company may vary and change its rates in such way as to make them just and reasonable, because the company is not allowed to make application to the board of supervisors to establish the rates. And the consumers are protected, fully, by the right to have the rates established by the supervisors whenever the company shall attempt to enforce unreasonable or unjust rates. This view of the law

is very clearly declared in the opinion of the learned judge of the circuit court in this case, as follows:

"Since, to make good the appropriation, it is essential that the water be applied to some beneficial use, these provisions of the statute of themselves necessarily presuppose that, until the action of the board of supervisors is called into play, the parties furnishing the water must designate the rates. It cannot be furnished for nothing. The law does not exact that, nor has any consumer the right to expect it. The statute evidently proceeds upon the theory that the rates charged by the person, company or corporation may be satisfactory to the consumers; in which event there would be no occasion for the intervention of the board of supervisors. But, to protect the consumers in the event such charges should be unsatisfactory, they, and they only, are given the right to first invoke the intervention and action of the board. Until that time, the rates established and collected by the person, company, or corporation furnishing the water prevail. This, it seems to me, would be the true and obvious construction of the statute if it had not so declared in terms. But the statute itself does so declare in terms, and in these words:

"Until such rates shall be so established (namely, those first established by the board), or after they shall have been abrogated by such board of supervisors as in this act provided, the actual rates established and collected by each of the persons, companies, associations, and corporations now furnishing or that shall hereafter furnish appropriated waters for such rental or distribution to the inhabitants of any of the counties of this state, shall be deemed and accepted as the legal rates thereof.' Act Cal., March 12, 1885, Sec. 4.

"Should the rates fixed by the board designated by the law for the purpose be so unreasonable as to justify the interposition of a court, any party aggrieved would have his remedy in the appropriate court, by which such unreasonable rates would be annulled, and the question again remitted to the body designated by the law to establish them. But in no case would the court undertake to do so. *Reagan v. Trust Co.*, 154 U. S. 420, 14 Sup. Ct. 1062; *Railway Co. v. Wellman*, 143 U. S. 339, 12 Sup. Ct. 400; *Santa Ana Water Co. v. Town of San Buena Ventura*, 65 Fed. 323. Therefore it is not for the court in the present case to go into the question of the reasonableness of the rates established by the complainant, and which it seeks to enforce. If unreasonable, and the consumers are for that reason dissatisfied therewith, resort must

first be had to the body designated by the law to fix proper rates, to-wit, the board of supervisors of San Diego county."

It seems to us that the position taken by the court below on this point is incontestable.

It is inconceivable that it should have been intended by the law makers that there should be no relief for a company that had once fixed a rate that must result, if not changed, in the absolute financial ruin of the company, as was the case here, and the ultimate defeat of the purpose sought to be accomplished, and deprive the consumers of the service to which they had become entitled. But it is hardly necessary to reason about the intention of this legislation when the purpose of the law is so obvious from its express provisions.

(d) *The Company was not estopped to change its rates.*

Of course, if the company could not legally bind itself to any fixed and unchangeable rate by contract it could not do the same thing indirectly by representations claimed to work an estoppel against it. But it was maintained, in the court below, and is urged here, that because the company sold land, with water, upon the representation that water would be furnished at \$3.50 per acre per annum, it must furnish it at that rate forever, whatever might be the consequences. The court below disposed of this point in the following language:

"As the water in question, from the moment the appropriation became effective, became charged with a public use, it was not in the power of either the corporation making the appropriation or of the consumers to make any contract or representation that would at all take away or abridge the power of the state to fix and regulate the rates. All persons are presumed to know the law, and those who bought lands from the complainant corporation upon its representations that water for irrigation would be furnished at the annual rate of \$3.40 an acre, or otherwise acted or contracted with reference to such rates, must be held to have known that the constitution conferred upon the legislature the power, and made it its duty, to prescribe the manner in which such rates

should be established. This the legislature has done by the act of March 12, 1885. As by that act the legislature deemed it proper to allow the action of the board of supervisors to be invoked in the first instance only by twenty-five inhabitants, who are tax-payers, of the county, and until then to leave the designation of rates to the person, company or corporation furnishing the water, to hold valid and binding any contract between parties with reference thereto would be, in effect, to ignore and set aside the provisions of the statute upon the subject; for it is plain that a contract must bind all of the parties to it, or it binds none; and, if binding at all, its manifest effect would be to remove from the regulation of the state the rates in question, and leave them to be governed and controlled by private contract, or such representation and acts as may amount to the same thing. No company or corporation charged with a public use can be estopped by any act or representation from performing the duties enjoined on it by law. It will hardly be contended that the defendants, by reason of any of the express contracts pleaded in defense of the suit, or of any contract growing out of the representations alleged to have been made by the company, would be estopped from applying to the board of supervisors of the county for the establishment of rates. The case, in truth, affords no basis for the operation of an estoppel against either party; which, to be good, must be mutual. *Litchfield v. Goodenow's Adm'r*, 123 U. S., 549, 8 Sup. Ct. 210."

This very clear and unanswerable statement of the law, and the reason for it, leaves nothing to be said on this point. But the actual history of this very company will show the absurdity of any such construction of the statute as counsel contend for. After fixing the rate of \$3.50 per acre the company found it necessary, in order to supply the water it had to its consumers, to put in a new and additional main pipe line at a cost of \$65,000.00, and to expend several thousand dollars more in the improvement of its dam, by which its water was stored. Besides, as the plant grows older the expenses of keeping it in repair must, in the nature of things, increase year by year. Therefore, if counsel are right, the company can receive no return on the large amount it has necessarily expended in enlarging and improving its plant

for the benefit of its consumers, or for its increased operating expenses, because it has, before making these expenditures, fixed a rate that can never be changed, or represented that the rate would be \$3.50 an acre, by which it is forever estopped to change the rate. There is, however, another and unanswerable reason why this claim of estoppel cannot prevail, if counsel are right in their contention that this is a matter of private contract. If it is the appellants are bound by their express contracts to pay the annual rates fixed by the company. The several contracts made by the appellants are referred to and commented on above. By their contracts they expressly agree to pay the rates as stated. If so no representations made by the company as to the rates it would charge, or was charging, could estop it to enforce the written contracts made, which give it the right to fix the rates. If, on the other hand, our contention is the correct one, that it is not a matter of contract at all, then of course there can be no estoppel.

*(c) The Statute of Limitations does not affect the question.*

It is contended that because the rate of \$3.50 per acre has been in force for five years the consumers have become vested with the right to the use of the water at that rate by virtue of the statute of limitations. We hardly think this point can be seriously made. It is certainly something entirely new and original. Either the company has the power to change its rates or it has not. If it has there is no limitation as to the time when it may do so. If it has no power to do so there could not be a running of the statute of limitations which can only occur when a party has the right and power to do a thing, but fails to exercise that right within the time limited by the statute.

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THE POWER GIVEN THE STATE TO REGULATE  
THE SALE OF WATER IS NOT IN VIOLA-  
TION OF THE CONSTITUTION OF THE  
UNITED STATES.

It is claimed that if the constitution of California gives to the state the power to say what rate a water company shall charge it is in violation of the constitution of the United States because it takes away from the company and its consumers the right to contract what the rates shall be.

This is a claim that, so far as we know, has never before been made by the consumers of water, for whose benefit alone the state constitution and statutes were framed and enacted. The claim has been made by the water companies but the courts, both state and federal, have uniformly ruled against it. So firmly has the right been established that we need do no more than cite the very latest decided cases on the subject where it is treated as fully and finally settled.

San Diego Land and Town Co. v. National City, 174

U. S. 739.

San Diego Water Co. v. San Diego, 118 Cal., 556.

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THE ALLEGATIONS OF THE ANSWER EX-  
CEPTED TO WERE BOTH INSUFFICIENT  
AND IMPERTINENT.

If the court below was right that the rates could only be fixed as prescribed by law, that they could not be fixed by private contract, or estoppel, or by prescription, but that if the rates fixed by the company were not satisfactory the only and exclusive remedy of the consumers was an application to the board of supervisors, it follows, necessarily, that an answer setting up alleged contracts, matters of estoppel, facts tending to show that the rates fixed by the company were unreasonable and the statute of limitations are both insuffi-



cient and impertinent. And upon either ground exceptions would lie.

Beach Mod. Eq., Secs. 406-420.

We submit that we have shown that the court below was right in the conclusion that the fixing of rates was not a matter of contract between the parties, and that the company could not be estopped by representations or lapse of time. It is equally clear that the court was right in holding that the remedy of the consumers, if not satisfied with the rates, was to apply to the board of supervisors to establish rates. This is the remedy given by statute. None other is provided for. The board of supervisors has exclusive jurisdiction over the question of fixing rates. The learned judge of the circuit court, after citing cases holding that the courts have no power or jurisdiction to fix rates, says:

"Therefore it is not for the court, in the present case, to go into the question of the reasonableness of the rates established by the complainant, and which it seeks to enforce. *If unreasonable, and the consumers are for that reason dissatisfied therewith, resort must first be had to the body designated by the law to fix proper rates, to-wit: the Board of Supervisors of San Diego County.*"

Lanning v. Osborne, 76 Fed Rep., 319, 336.

It is undoubtedly the law that where a court is specially designated, by statute, as the tribunal vested with jurisdiction in a given action or proceeding, resort must be had to that court, at least in the first instance.

Case of Broderick's Will, 21 Wall, 503.

The purpose of the bill was not to have it determined that the rates fixed by the company were reasonable, but to have the right of the company to fix its own rates established, and

to prevent a multiplicity of suits by individual consumers to compel the company to supply water at the old rate.

Lanning v. Osborne, 79 Fed. Rep., 657.

And the court below rendered no decree affecting the question of the reasonableness of the rates.

Record, pp. 64, 66.

If we are right in our view of the law, as it was declared by the circuit court, the allegations of the answer, to which exceptions were sustained, were both insufficient and impertinent. And this being decided, and the one and only thing that could have been a sufficient answer, viz., that the appellants, or others competent to do so, had applied to the board of supervisors and had rates fixed, not having been shown by the answer, and the defendants declining to answer further, the complainant was entitled to the decree pro confesso given it by the court. Counsel complain that the remedy pointed out by the statute is not adequate because it would take time to have the rates fixed by the board of supervisors and the consumers might be compelled to pay the rate fixed by the company in the meantime and it might not be possible to secure the necessary twenty-five to petition for a change of the rates. But it is enough to say that this is the sole and only remedy provided by law, and the courts cannot supply another remedy that might seem better to the complaining party. Besides, in this case the assumed hardship of inadequacy of the remedy is purely imaginary. The statutory remedy is summary in its nature and may be brought to a hearing in four weeks.

Stat. Cal., 1885, p. 95.

And the company had, months before the new rate was to take effect, notified all of its consumers that it would go into effect the first of the following January. This was before the

appointment of the receiver and the receiver was appointed September 4th, 1895.

Record, p. 8.

This was nearly three months before the new rate was to take effect.

Record, p. 11.

And, as there were two hundred or more consumers, complaining of the new rates, it would not have been difficult, we presume, for them to find twenty-five petitioners for the establishment of rates by the board of supervisors. But they chose rather to contest their right to a \$3.50 rate, to the end, on the ground that neither the company, nor the board of supervisors had any power to change that rate. They did later, secure rates to be fixed by the board of supervisors and undertook to have this suit dismissed on the ground that rates had been so established and supported their motion by an affidavit of one of their counsel.

Record, p. 63.

So, their complaint that it was a hardship to compel them to resort to the remedy provided by statute, or that such remedy was inadequate, has no more force in fact than it has in law.

Counsel cite many authorities to support the position that a water right is property and may pass by contract. As we have said we do not dispute this contention, and it was in no way in issue in this suit. But the court will find that the cases relied upon as supporting the further contention made by counsel that an interest or ownership in the pipe line or system, by and through which the water is supplied, may be owned and conveyed, are cases involving private water rights and ownership, in private pipe lines or ditches.

Hayes v. Fines, 91 Cal., 391;

Standart v. Round Valley Water Co., 77 Cal. 399;

Fudicker v. East Riverside Ir. Dist., 109 Cal., 29, 36.

But it cannot be possible that a consumer taking water from a corporation dealing in water, as a public use, under the state constitution, can become a joint owner with such a *quasi* public corporation in the plant that is being used for the public good, as a public franchise, and under state regulation and control. Such an idea is wholly repugnant to the purposes and objects of the constitution and statutes of the state and if enforced would be entirely subversive of all legislation of the state enacted for the purpose of protecting water consumers from private monopolies and the enforcement of unjust and oppressive rates for water.

Counsel see proper to criticise the construction given by the court below to the constitutional and statutory provision, for the regulation of rates because, as they claim, it vests in the corporation power to change and increase its rates without limitation, while the board of supervisors are hedged in by statutory provisions limiting its powers as to the rates to be fixed. But this criticism is unfounded and unjust. There is a speedy and effectual remedy, if the company fixes unreasonable rates, by resort to the board of supervisors. Therefore, such rates are not permanent or binding, but may be set aside at any time as provided by the statute. On the other hand, the rates fixed by the board of supervisors are absolutely binding on all parties concerned, for at least one year, subject only to be set aside by a court of equity on the ground that they are so unreasonable as to violate the constitutional rights of the parties or one of them.

Stat., Cal., 1885, p. 97.

So there is no injustice or wrong in allowing the company to fix its own rates subject to the safeguards and remedies provided by the constitution and statutes of the state.

Touching this question, the learned judge of the court below says in his opinion:

"The statute evidently proceeds upon the theory that the rates charged by the person, company, or corporation, may be satisfactory to the consumers; in which event there would be no occasion for the intervention of the board of supervisors. But, to protect the consumers in the event such charges should be unsatisfactory, they and they only, are given the right to first invoke the intervention and action of the board. Until that time, the rates established and collected by the person, company, or corporation furnishing the water prevail. This, it seems to me, would be the true and obvious construction of the statute if it had not so declared in terms. But the statute itself does so declare in terms."

After this case was decided by the court below on exceptions to the original answer and as a result of that decision, counsel for the defendants framed and had passed by the legislature an act intended to nullify both the decision of the court and all previous legislation on the subject by preserving, if the constitution would allow it, the right to fix the rates by private contract.

Stat., Cal., 1897, p. 49.

Having procured this amendment they pleaded it in their amended answer.

Record, p. 37.

As to the effect of this amendment we feel that we need do nothing more than cite the opinion of the court below relating thereto.

Lanning v. Osborne, 82 Fed. Rep., 575.

But the court might have gone further and held, in accordance with the facts, that no contract was ever made between the parties to this suit fixing the annual water rates to be paid, but on the contrary, as we have shown above, the contracts, in every case, obligated the defendants to pay the rates fixed by the company. Therefore, this amendment was entirely inoperative, so far as the parties to this suit are concerned, because the contract to pay rates fixed by the company "as allowed by law," was subject, always, to the existing statute authorizing the board of supervisors to es-

tablish new rates. However, the reasons given by the court below for holding the statute to be inoperative, were amply sufficient.

It is unnecessary to follow counsel in the discussion of the sufficiency of the reasons given by the complainant, in its bill for increasing its rates, as the court below very properly held that the reasonableness of the rates was not in controversy and no decree was given thereon. It must be obvious, that the reasons for making a change in the rates are immaterial unless the court below was wholly wrong in the conclusion it reached that by the terms of the statute the company was given the right to fix its own rates, subject only to the right of the consumers, or other citizens, and tax-payers, to have the same set aside and new rates established by the board of supervisors.

If the court was wrong in that conclusion, on any of the grounds urged by counsel, then, also, the reasons for increasing the rates are unimportant because the company, if counsel are right, had no power to change its rates at all or for any reasons.

#### THE COURT BELOW HAD JURISDICTION OF THE CAUSE.

Counsel make the point that the Circuit Court had no jurisdiction, and attempt, in a very feeble way, to support the point by argument. This same point was made in the court below and fully argued. The reasoning of the judge of the circuit court, in the opinion relating to this question, and the grounds upon which the jurisdiction was upheld, are conclusive and need no supporting argument from us.

*Lanning v. Osborne*, 79 Fed. Rep., 675.

Again, it is urged that the appellee in whose favor the decree pro confesso was rendered, was not properly a party to the suit, or entitled to a decree in its favor, and that having been made a party, an original bill in its behalf was necessary.

But the appellee was not a new party asserting an original cause of action on its behalf. It had purchased the property and rights of the old San Diego Land and Town Company. It stood in precisely the same position that the old company would have occupied if the receiver had been discharged, without a sale of the property, and a return of the property to it. The receiver was no more than the holder of the property for the company and its creditors. Upon a sale of the property by the receiver, to the new San Diego Land and Town Company, it was entitled to take the place occupied by the receiver in the suit. The appellee came into the case after it had gone beyond the stage when pleadings were necessary or proper, and the receiver was entitled to a decree. When the appellee was substituted it was in the place of the receiver and with the right to proceed as the receiver could have proceeded.

Proper proceedings were taken for the discharge of the receiver and the substitution of the owner of the property.

Record, pp. 60, 61, 62.

After which notice was given, by the substituted complainant, that it would move for an order that the bill be taken pro confesso, in its favor, which was done, and the order made after a hearing, at which the defendants appeared.

Record, pp. 62, 63.

The defendants, having already defaulted, took no steps to be relieved of such default, and did not ask leave to answer further because of the substitution of the appellee.

And it is recited in the decree that the appellee was substituted as complainant by order of the court, and an order made that a decree pro confesso be entered in its favor.

Record, p 66.

So the appellee was connected with the record and decree in the most direct and proper way, as appears from the enrolled papers.

If the appellants desired to test the right of the substituted complainant to a decree, by the allegation of any new matter affecting it and not applicable to the complainant receiver, they should have asked leave to plead further. Not having done so the substitution of the appellee, upon a showing that it had succeeded to all of the rights of the receiver, including the right to the decree to which the receiver was then entitled, as of course, was all that was necessary.

In conclusion we have to say that in our demurrer to the bill of review we made the point that a bill of review is not the proper remedy in a case of this kind, but the party must resort to the remedy provided by statute, viz., an appeal.

Record, p. 86.

We also moved to strike the bill from the files on the ground that the decree sought to be reviewed and set aside had not been performed by paying the back water rates adjudged to be due the complainant.

Record, p. 79.

But it is more important to all parties concerned that the important questions presented by this appeal should be speedily and forever settled than that the present appeal should be defeated on technical grounds. And for that season we do not press these points.

All of the questions presented by this appeal were fully argued in the court below, and received the most careful and conscientious consideration of the learned judge of that court whose learning and ability, and familiarity with the questions involved, are so well known that in many instances we have, instead of entering upon an extended argument of the points made by counsel on the other side, contented ourselves by citing the opinion rendered in the court below. We have not done this out of any want of appreciation of the arguments of opposing counsel, but because we felt that the



opinions of the court below fully covered the ground and needed no support from us, and that to undertake to argue the questions would burden this court unnecessarily. The importance of the questions involved here can hardly be overestimated. As we view them it is the simple question whether the state of California can and has provided for the regulation of the supply of water to its inhabitants by corporations that have procured the right, by appropriation, to divert the waters of the running streams of the state, or whether the corporation may still take away, entirely, the power of the state to exercise any such control by contracting with its consumers in such way as to fix its rates for all time to come. Doubtless such a construction of the law would be entirely satisfactory to the water companies, as they are the parties against whom state legislation looking to such state control has been directed, and who are the sufferers by the manner in which such control is exercised. And the course of the consumers, in this particular instance, in attempting to enforce their construction of the law, because they think the rates alleged to have been fixed by contract are the best that can be had, is eminently selfish and exceedingly unwise. No doubt the rates claimed to exist here are unjust and ruinous to the company, and advantageous to the consumers, so long as the company can survive and supply water at such rates, which cannot be for long. But if the company and its consumers can fix the rates, to exist forever, in one case, the right must exist in all cases, and if rates, unjust and ruinous to the consumers, can be established by contract, and the board of supervisors have no power to revise or change them, then the very objects and purposes of the laws of the state, enacted to protect water consumers from just that thing, are defeated, and these beneficial laws must go for naught.

We cannot believe that any such conclusion can be reached

by the courts. It is impossible without overturning, completely, all of the legislation of the state on this important submit.

We respectfully submit that there is no error in the record.  
Respectfully submitted,

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CHARLES D. LANNING,

Of Counsel.

Office Supreme Court U.

FILED

DEC 11 1899

JAMES H. McKENNEY,  
Clerk

No. 201.

Brief of Garber <sup>IN THE</sup> Ex Parte.

Supreme Court of the United States.

Filed Dec 11, 1899.  
OCTOBER TERM, 1899.

No. 201.

H. C. OSBORNE, WILLIAM KNAPP,  
A. BARBER et al.,

Appellants,

vs.

THE SAN DIEGO LAND AND  
TOWN COMPANY OF MAINE.

Appeal from the Circuit Court of the United States  
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Brief of John Garber and Frank H. Short,  
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It appears from the record in this case, from the briefs filed in the lower Court and from the opinion of the lower Court, as reported in Volume 76 of the Federal Reporter, at page 319, that one of the questions in

controversy between the contending parties is the question whether, under the Constitution and laws of California, a water company, engaged in the business of supplying water to the general public, for irrigation, can enter into a valid and binding contract with a consumer, fixing a specific price or rental for water to be furnished him by the company, for use in the irrigation of his lands.

Inasmuch as this question is of great importance both to irrigation companies and to consumers, we have asked the privilege of presenting to this Court an argument in favor of the proposition that there is nothing in the Constitution of California, nor in any of the statutes of that State, nor in the general law governing the method of conducting a business charged with a public use and involving the exercise of a franchise, which is at all inconsistent with the validity, legality and binding force of a contract of the kind above referred to. This position is at variance with the views expressed in the opinion of the lower Court (76 Fed. 319); but we hope to be able to show that it is correct, upon principle and authority, and moreover, that contracts of the kind in question have been repeatedly and uniformly recognized and enforced by the Supreme Court of California.

It would seem to be doubtful whether such portions of the opinion of the Circuit Court as relate to the question whether a valid contract fixing the price of water is possible, under the California law, are not

*obiter*; since there is evidently a question as to whether the record discloses any such a contract; but in the event that this Court should conclude that the question as to the validity of water rate contracts is really in issue in this case, we beg leave to submit the following statement of the reasons and authorities upon which we rely as establishing the validity of such agreements.

**The Supreme Court of California has always upheld and enforced contracts between irrigation companies and consumers fixing the rate of compensation for furnishing water.**

In *Fresno Canal & Irrigation Co. vs. Dunbar*, 80 Cal. 530, the judgment of the lower Court was affirmed. That judgment foreclosed the lien of a contract between the irrigation company and the owner of the land upon which the lien was foreclosed. By the terms of the contract the irrigation company agreed to furnish to the landowner or his successors in interest, for a term of years, all the water that might be required for the irrigation of a tract of land, specifically described, not exceeding a specified quantity. The right to this water was to be appurtenant to the land and pass with it. The landowner on his part agreed to pay a stated sum of money at once, and in addition to this an annual payment of a stated sum, and it was further agreed that the covenants contained in the contract should run with and bind the land.

In *Fresno Canal & I. Co. vs. Rowell*, 80 Cal. 114,

the Supreme Court held that a similar contract created a lien on the land which could be enforced by foreclosure against the land and every grantee thereof who is not a *bona fide* purchaser without notice.

In *Clyne vs. Benicia Water Co.*, 100 Cal. 310, a judgment decreeing specific performance of one of these water right contracts, was affirmed.

If it be asserted that in these cases no point was made as to whether these contracts were in violation of any constitutional or statutory provision regarding the sale, rental or distribution of water, we reply that the judgment of the Court necessarily implied the validity and enforceability of the contracts, and since the record in each of these cases showed all the facts necessary to inform the Court of the nature of the contract in relation to the constitutional and statutory provisions above referred to it must be presumed that the Court considered the question of whether the contracts were in contravention of the Constitution. As was said by the Court in *City of Los Angeles vs. Pomeroy*, 124 Cal., at p. 641, in reference to the question of whether the pueblo of Los Angeles was extinguished, or its rights to the waters impaired by the abolition of the ayuntamiento,

“This question, however, ought to be considered closed by the previous decisions of this Court in the *Vernon Irrigation Company's* case, and others. All of the laws and public documents upon which its solution depends are within the judicial cognizance of the Courts, and whether they were actually



noticed or not in the previous decisions, they must be deemed to have been considered and allowed their due weight."

And see as also illustrating the applicability of the doctrine of *stare decisis*; and showing that this is pre-eminently a case where the previous adjudications and rulings should be firmly adhered to.

*Sacramento Bank vs. Alcorn*, 53 Pacific, p. 814.

Water right contracts have been recognized and treated as valid in

*San Diego Flume Co. vs. Chase*, 87 Cal. 561;

*Balfour vs. Fresno Canal & I. Co.*, 109 Cal. 221.

*Fairbanks vs. Rollins*, 54 Pac. Rep. 79, is a case where the Supreme Court of California rendered a decision which necessarily involved the determination of the question as to whether a water right contract can be valid and binding under the constitution and laws of California. And not only was this question involved by necessary implication from the nature of the judgment, but it appears from the record in that case that the contract was expressly attacked on the ground that it was contrary to the constitution and statutory law of California. Although in the opinion of the Court this objection was not specifically discussed, it is evident that it was not overlooked.

The facts in this case were as follows: The plaintiff sued upon a promissory note which was, by its terms, payable upon the tender by plaintiff to defendant, the maker of the note, of a good and sufficient water right

for the irrigation of a parcel of land containing 4.22 acres, the same to be sufficient to furnish water to the amount of at least 1-7 of an inch to each acre in said parcel of land. Plaintiff tendered defendant 5 water certificates of a certain water company, a corporation, together with a tender of a right of way through a certain pipe line reaching his land, for the conveyance of the water represented by said water certificates. By these certificates, the corporation in terms guaranteed to the holder thereof a flow of water to every acre of land, to which the water was to be devoted. The defendant refused to pay the agreed amount and placed his refusal on the ground that the certificates tendered were worthless and could not vest in or transfer to the holder any water or water right whatever. One of the grounds upon which this contention was rested, as appears both from the brief of the plaintiff and that of the defendant, was that the constitution and statutes and public policy of the State of California did not admit of the transfer of the water right or the making of a contract fixing the amount of compensation for the water right. This point was distinctly raised in the appellants' brief and was fully replied to in the respondent's brief. The respondent carefully considered the question whether water is the subject of private ownership under the constitution and laws of California, and also discussed at length the question whether the existence of a legislative power to regulate water rights precluded the sale of water rights, and the determination by means of a contract of the price thereof.

An examination of the respondent's brief, in *Fairbanks vs. Rollins*, shows that the point made by the respondent's attorneys was merely that, even though it should be admitted that the Legislature had the power to regulate the charges of water, and that, therefore, a water right would be taken subject to this power of regulation, nevertheless the water right, even though thus subject to regulation, would still constitute property and be a valid consideration for the promise to pay for it. The opinion (reported in 54 Pacific Reporter) shows that the Court considered the question whether the water certificates were valid and constituted a good consideration for the note. The Court expressly said that

"it was further averred in the answer that the said certificates constitute no water right, and they do not and cannot vest in or transfer to the holder thereof any water or water right whatever and that they are of no value."

After such a question as this had been presented to and noticed by the Court, it certainly cannot be that the Court meant to pass over the question whether these certificates constituted a water right. The record contained a finding to the effect that the tender made by the plaintiff was an offer to convey the water right in accordance with the terms of the contract, and that the certificates entitled the holder to the water described on the face of the same, and were of the value of \$500, at least, and that such certificates convey and transfer the water and water rights represented on their face,

If the proposition advanced by the counsel for appellant in *Fairbanks vs. Rollins* as to the invalidity of a water right contract had been well taken, the finding above referred to would have been erroneous, as a matter of law; for the legal proposition relied on by the appellants was absolutely inconsistent with the finding that the certificates conveyed and transferred the water and water rights represented on their face, and entitled the holder to water described on the face of the same. If the position of the appellant was correct, the certificates tendered could not have been a good consideration for the note, because they could have transferred no right or title to the water or its use. This is apparent on the face of the findings in *Fairbanks vs. Rollins*. For these findings are that the certificates tendered were certificates of a water company, and if the position taken, by the appellants, that the water company could not transfer title to a water right, was correct, it would follow that the certificates which were tendered to the defendant could transfer no rights to the water, and would therefore be worthless. Hence, the affirmance of the judgment by the Supreme Court in the face of the findings and of the points expressly made in the briefs, amounted to an overruling of the contention that a water right contract is repugnant to the Constitution and laws of the State of California.

In view of these authorities, it is submitted that the law of California has been interpreted by the Supreme Court of that State as sanctioning the making of con-

tracts which fix the rate of compensation for furnishing water.

This is the view taken of this matter by the Circuit Court of Appeals in the recent case of *San Diego Flume Co. vs. Souther*, 90 Fed. 164. In that case the Circuit Court of Appeals, in reversing the decree of the Circuit Court, decided that, prior to the establishment of water rates by public authority in pursuance of the Act of the California Legislature of March 12th, 1885, the matter can be adjusted by contract. The Court thus states its view of the contractual powers of water companies under the Constitution and laws of California, as interpreted by the Supreme Court of that State:

"In the cases of *Irrigation Co. vs. Rowell*, 80 Cal. 114; *Irrigation Co. vs. Dunbar*, 80 Cal. 530; *Flume Co. vs. Chase*, 87 Cal. 561; and *Clyne vs. Water Co.*, 100 Cal. 310, the Supreme Court of California has recognized the validity of contracts between water companies and consumers. It is urged, however, against the binding force of these decisions, that in none of them was the question of validity of contracts such as that involved in this case expressly raised, considered or decided. \* \* \* It is not to be presumed that in rendering these decisions the Supreme Court of California was unmindful of the questions which are expressly raised in the present litigation. 'We are bound to presume that when the question arose in the State Court it was thoroughly considered by that tribunal, that the decision rendered embodied its deliberate judgment thereon.' *Cross vs. Allen*, 141 U. S. 528-539."

The Court further says that the trend and purport of

the decisions of the Supreme Court of the State of California are to the effect that notwithstanding the fact that the Constitution declares that the use of waters of the State appropriated for irrigating purposes is a public use, and the further fact that under the law of 1885, upon the petition of 25 consumers, the Commissioners of the county may fix the rates to be charged by the company and paid by the consumer, nevertheless, until such rates are fixed in pursuance of law, the corporation furnishing the water and the consumer receiving it, are left free to make such contracts as they may see fit to make, and their agreements will be sustained in the Courts.

The Supreme Court of California having thus recognized and enforced contracts fixing water rates, it is submitted that the Federal Courts, including the Supreme Court of the United States, should follow those decisions. The interpretation placed by the Supreme Court of a State upon the Constitution and laws of that State should be adopted and followed by this Court.

It is to be presumed that other contracts have been made, and that money has been invested, in reliance upon the stability of the decisions above referred to.

“ It does not need that manifestly a decision, or a series of decisions, should have actually become a rule of property, or have entered into vested rights, in order to secure for it an immunity from ready changes. If it is to be reasonably presumed that it may have done so, or if it is merely prob-

able that it has done so, the courts will hesitate to disturb it."

*Wells—Res. Adjudicata and Stare Decisis*, Sec. 601.

We submit that the decisions which have recognized the validity of water right contracts should not be disturbed; for to change the rule which has for years been acquiesced in by both irrigation companies and by consumers, would have the effect of depriving the irrigation companies of the income which by these contracts is secured to them, and of taking from the land owners rights which have attached to their lands, and for which they have paid out large sums of money. The real users of water in California are quite well satisfied with their rights under existing contracts. And if the contracts were adjudged void and the large non-using land owners exempted from their contracts the real irrigators would be the principal sufferers ultimately under rates fixed by boards of supervisors.

**There is nothing in the constitution or the statutes or the public policy of the State of California which is in the least inconsistent with the validity and binding force of contracts fixing the amount of the water supplier's compensation.**

Those who attack contracts of the kind above-mentioned contend that an individual or corporation engaged in the business of supplying water to the public, for irrigation or other purposes, cannot make bind-

ing contracts with the parties whom it supplies with water; that the determination of the amount of compensation for which, and the terms and conditions upon which, the water is to be supplied is a matter wholly beyond and outside of the domain of contract; a matter which can be regulated only by the action of some official or body authorized by law to establish the rates and terms upon which water shall be supplied to consumers.

This theory, we contend, is manifestly unsound and entirely unwarranted by any provisions of the constitution or the statutes of California, and is based upon an erroneous and distorted conception of the purpose of the constitutional and statutory provisions relating to the sale, rental and distribution of water in that State.

One of the propositions relied upon as supporting the theory that no contract relating to the rates and terms upon which an irrigation company will furnish water to consumers can be valid, is that water appropriated for sale, rental and distribution does not belong to the party so dealing with it; that there can be no ownership of water by an irrigation company, but that all such companies act merely as the agents of the public, in the work of distributing property which belongs to the public.

In support of this point it is sometimes urged that there can be no property in the corpus of water, the only property possible being a right to its use.



But these considerations can throw no light whatever upon the question of the validity or invalidity of a contract of the kind we are now discussing. If it be true that there can be no ownership of the corpus of water and that the only property in water is a right is its use, this applies to the rights of all proprietors of water, whether they be parties who have devoted their property to a public use, or parties who have reserved their water for their own consumption, and whether they are riparian proprietors or appropriators.

Yet no one will attempt to deny that both a private riparian proprietor and a private appropriator—proprietors who use the water for their own consumption, and do not offer it to the public for sale, rental or distribution—have an unquestionable right to sell, transfer, lease or otherwise dispose of the property on whatever terms they can agree upon with other parties. The case of *McFadden vs. Board of Supervisors*, 74 Cal. 571, settles this question, and clearly defines the difference in this connection, between the property rights, in water, of one who devotes his water to a private use, and the rights of one who appropriates his water to a public use.

The usufructuary character of property in water is not the characteristic which renders the water of an irrigation company subject to a public use and to regulation by the state. While on the one hand it is true that an owner who has but a usufructuary right in his property, may

nevertheless retain his power to contract with reference to that property, untrammelled by state regulation, on the other hand, one who owns the corpus of his property may be subject to such regulation on the ground that the property has been devoted to a public use.

Thus, even were it admitted that no one can have anything more than a usufructuary property in water, the question as to the extent to which the holder of this usufructuary property is free to sell and transfer the same, and to make contracts concerning it, would still remain unanswered. It follows that the contention that an irrigation company has no power to make binding contracts concerning the sale and rental of the water supplied by it to its consumers cannot be sustained unless there is some legal limitation upon him other than the lack of ownership of the corpus.

But of course it is contended that such a limitation does exist; and that this limitation is imposed by the general law respecting public uses; and also by explicit provisions found in the constitution of California, and by certain statutory enactments made in pursuance of these provisions. The constitutional provisions relied on are contained in sections 1 and 2 of article XIV of the constitution, and the statutes are the Act of March 26th, 1880 (Stats. of Cal. 1880, p. 59), and the act of March 12, 1885, (Stats. of Cal. 1885, p. 95).

The constitutional provisions read as follows:

## ARTICLE XIV.

Section 1.—The use of all water now appropriated, or that may hereafter be appropriated, for sale, rental or distribution, is hereby declared to be a public use, and subject to the regulation and control of the State, in the manner to be prescribed by law; provided, that the rates or compensation to be collected by any person, company or corporation in this State for the use of water supplied to any city and county, or city or town, or the inhabitants thereof, shall be fixed, annually, by the board of supervisors, or city and county, or city or town council, or other governing body of such city and county, or city or town, by ordinance or otherwise, in the manner that other ordinances or legislative acts or resolutions are passed by such body, and shall continue in force for one year, and no longer. Such ordinances or resolutions shall be passed in the month of February of each year, and take effect on the first day of July thereafter. Any board or body failing to pass the necessary ordinances or resolutions fixing water rates, where necessary, within such time, shall be subject to peremptory process to compel action at the suit of any party interested, and shall be liable to such further processes and penalties as the Legislature may prescribe. Any person, company, or corporation collecting water rates in any city and county, or city or town in this State, otherwise than as so established, shall forfeit the franchises and water works of such person, company or corporation to the city and county, or city or town where the same are collected, for public use.

Section 2.—The right to collect rates or compensation for the use of water supplied to any county, city and county or town, or the inhabitants thereof, is a franchise and cannot be

exercised except by authority of and in the manner prescribed by law.

It is submitted that there is nothing in the general law respecting property subject to a public use, nor in the foregoing extracts from the constitution, which can militate against the right of an irrigation company to make a contract of the kind now under discussion. The statutes of 1880 and 1885 we will consider later on. But now, taking the constitution itself, and viewing its provisions in the light of, and in connection with, the general law governing property charged with a public use, we assert that nothing will appear which does not harmonize with such contracts.

What was the object of these constitutional provisions concerning the use, sale, rental and distribution of water? We answer that it was simply and solely to establish clearly and in such manner that it could never be ignored by the legislature, the principle that the business of supplying the public with water is within the scope of the rule announced by the Supreme Court of the United States in the leading case of *Munn vs. Illinois*; the rule that when private property is devoted to a public use, it is subject to public regulation; that where a business is clothed with a public interest, it is subject to legislative control and direction as to the manner in which, and the terms upon which, it may be carried on. The language of the constitution is fully accounted for without ascribing to the framers of that instrument an intention to do more

than effectuate the purpose above indicated. The dissenting opinion in *Munn vs. Illinois* shows that the Court experienced difficulty in determining under what circumstances property becomes affected with a public use. This is pointed out by Mr. Justice Field in delivering the opinion of the Court in *Georgia Railroad Co. vs. Smith*, 128 U. S. 174, 9 S. Ct. 47, 49. He there says that

“there have been differences of opinion among the judges of this Court in some cases as to the circumstances or conditions under which some kinds of property or business may be properly held to be thus affected (i. e. affected with a public use) “as in *Munn vs. Illinois*.”

In his dissenting opinion in *Munn vs. Illinois*, Mr. Justice Field took the position that property or business can be affected with a public use, so as to be subject to legislative regulation, only in cases where some special privilege or franchise has been conferred by the government upon the proprietors of the property or business in question. In this view he was at variance with the majority of the Court, who held that, apart from any question of the exercise of a franchise or special privilege, a business might be of such great importance to the general public, and so much in the nature of a practical monopoly, as to be affected with a public use. In view of these differences of opinion among the justices of the Supreme Court, there was good reason for placing in the constitution an express provision to the effect that the business of supplying the public with water is a franchise; and in view of the

acknowledged difficulty of determining whether a given business is of sufficient importance or sufficiently in the nature of a monopoly to be clothed with a public use, it was only natural that the framers of the constitution should, by an express declaration, include the business of supplying the public with water within the class of industries affected with a public use. Moreover, as pointed out by Judge Ross in *People vs. Stephens*, 62 Cal. 233, the framers of the constitution intended to take away from the legislature the power, formerly residing in that body, to say whether the sale, rental and distribution of water should be a public use. All of the provisions relating to water found in the Constitution of California, are thus fully accounted for on the hypothesis that the purpose of the convention was merely to securely place the business of selling, renting and distributing water to the general public in the same category with the business of operating a railroad, or a canal, or a ferry, or a grain elevator, or any other enterprise which, because of its peculiar nature, is clothed with a public use.

The debates in the constitutional convention contain passages which lead to the same conclusion.

In discussing these provisions during the discussion of the first section of Article XIV (which was introduced as amendment to the report of the committee by Mr. Hale), Mr. Howard said:

"The amendment of the gentleman from Placer

(Judge Hale) covers the whole question as far as it goes; and that is that when water is appropriated for sale or rental, that becomes a public use, as decided in the elevator case."

*Debates of the Constitutional Convention*, Vol. 2, page 1022.

Mr. Shafter said (see page 1021):

"I suppose the convention will apply the principle of the elevator case to this provision; and that is the common sense view to take of it."

There is nothing in the phraseology of the first and second sections of Article XIV which calls for a construction different from that above suggested. We need not dwell, at this point, upon the provisions in section one relative to the method of fixing water rates in municipalities, since, as we shall hereafter more particularly point out, these specific provisions have no application to localities outside of cities and towns. As to the other provisions of section one and the provisions contained in section two, it is submitted that, properly construed, they amount to no more than this -that the business of supplying water to the general public is clothed with a public use, and subject to legislative control, and that the right to collect compensation for this service is a franchise, which cannot be exercised as a matter of common right, but only as a special privilege granted by the State; and that the manner in which such a privilege can be exercised may be prescribed by the power which grants it; and that it can be exercised only in conformity to such regulations and restrictions as that power may impose.

A construction which converts the provisions in question into an inhibition of any transaction of business by a water company except in pursuance of specific directions from some official source, is, we submit, strained and fanciful. Assailants of water rate contracts take the position that the concluding portion of section two is equivalent to a declaration that the privilege of collecting water rates cannot be exercised at all, unless some official regulation has been made, prescribing the terms and conditions upon which compensation for the furnishing of water may be collected, and designating the amount of such compensation. We insist, on the contrary, that all that is meant by this concluding portion of section two is that the franchise in question shall not be exercised in any manner inconsistent with such regulations as may have been legally imposed.

The purpose and meaning of sections one and two of Article XIV being such as we have stated, it follows that there is nothing in these provisions at all incompatible with the existence of property rights on the part of an irrigation company, in the water which it supplies to the public, or with the power of such a corporation to enter into contracts with its customers concerning the terms upon which the water shall be furnished.

Property affected with a public use may still continue to be private property, although stripped of some of the incidents of absolute ownership. The property



rights of one whose property is devoted to a public use are, of course, curtailed and restricted by reason of the existence of this use. But there is an obvious distinction between the restriction of the scope of a property right and its obliteration. Thus, although the property used by a railroad company in the operation of its road is clothed with a public use, and though the operation of the road is a franchise and, as such, subject to State regulation, the ownership of the property is nevertheless private.

*Olcott vs. Supervisors*, 16 Wall. 678.

In the opinion of the Court in that case we find the following statement :

“Whether the use of a railroad is a public or private one depends in no measure upon the question who constructed it or who owns it. It has never been considered a matter of any importance that the road was built by the agency of a private corporation. No matter who is the agent, the function is that of the State. Though the ownership is private the use is public.”

In *Inhabitants of Worcester vs. Railroad*, 4 Met. 564, the Court says (p. 566) :

“It is true that the real and personal property necessary to the establishment and management of the railroad is vested in the corporation ; but it is in trust for the public.”

In *Welsh vs. County of Plumas*, 80 Cal. 341, it is held that the right of way owned by the keeper of a toll road is private property, though for public use.

The recognition of private ownership in property

clothed with a public use is apparent throughout the opinion of the Court in *Munn vs. Illinois*, 94 U. S. 113.

In *San Diego Co. vs. San Diego*, 118 Cal. 556, the Court says (p. 570) that the public may be said to be the real owner of the water and distributing works of a water company; but there is no distinction made between the water and the pipes, reservoirs and other property used in the distribution of the water. This shows that the Court regarded the qualified character of the ownership of water by a water company as due, not to anything peculiar to water, as distinguished from other kinds of property, but as due solely to the fact that the company had devoted the water to a public use.

We take it that no more was meant than that the ownership of property clothed with a public use is qualified and limited; that the owner holds it subject to certain obligations and trusts in favor of the public. This idea is more clearly expressed in another portion of the same opinion (p. 567), where the language of the Court is

“That the water company does not own the water which it collects and supplies, or the plant which it uses to collect and distribute that water in the same sense that a man is said to own his house or his farm.”

It is true that in the opinion (118 Cal. 570) it is intimated that, by regulating the rates which a water company may charge, the state virtually takes the water and the distributing plant, and that the company

no longer remains the real owner. But it is to be noted that this is not confined to the water, but embraces the distributing plant as well. Necessarily, then, what is said as to the loss of ownership would apply to the case of any owner of property, the rates for the use of which are fixed by public authority. It would apply to a railroad company as fully as to a water company, and hence the opinion of the Court might seem to uphold the theory that even a railroad company is not the real owner of its property, when the State, by regulating fares and freight rates, has virtually taken the property. But the decisions of the Supreme Court of the United States in which is advanced the doctrine that the regulation of rates may amount to a taking of the property for whose use the rates are charged, do not countenance the idea that a regulation of rates is equivalent to an absolute taking of the property. At most they treat such regulation as a taking of the use, or a portion thereof, the title remaining where it was.

*Regan vs. Farmers' L. & T. Co.*, 154 U. S. 362;  
14 Sup. Ct. 1047, 1059.

See also *Ames vs. Union Pac. R. R. Co.*, 64 Fed. 165, where the Court, in distinguishing between a reduction of rates and an absolute taking of the property, points out that in the former case the owners must continue to own the property.

It must be a mistake, then, to assume that the regulation of the use of property can, of itself, transfer

the ownership to the public. A *fortiori*, the mere existence of a power to regulate—the mere fact that the property is affected with a public interest, and is therefore subject to legislative control—cannot constitute the public the real owner of the property.

Indeed this last proposition is a corollary of the proposition that a reduction of rates may amount to a taking of property ; for prior to the regulation of rates the property must remain in the private owner, since otherwise there would be no property for the public to take.

That a water company retains the ownership of the property which it has appropriated to the service of the public, and cannot be deprived of this property without just compensation, is decided by this Court in the recent case of *San Diego L. & T. Co. vs. National City*, 19 Sup. Ct. 804.

Any fancied distinction, with respect to property rights, between a water company and a railroad company, or any other proprietor of property clothed with a public use, is dispelled by the opinion in this case. All of these enterprises are placed on the same footing and the same constitutional guarantee is held to cover them all. On page 810 the Court says :

“ That it was competent for the State of California to declare that the use of all water appropriated for sale, rental or distribution should be a public use, and subject to public regulation and control, and that it could confer upon the proper municipal corporation power to fix the rates of compensation

to be collected for the use of water supplied to any city, county or town, or to the inhabitants thereof, is not disputed, and is not, as we think, to be doubted. It is equally clear that this power could not be exercised arbitrarily, and without reference to what was just and reasonable as between the public and those who appropriated water and supplied it for general use ; for the State cannot by any of its agencies, legislative, executive or judicial, withhold from the owners of private property just compensation for its use. That would be a deprivation of property without due process of law."

We have discussed this question of the ownership of water at some length because of the contention frequently made that a party who supplies water to the public cannot be the proprietor of the water, and therefore cannot be in a position to sell a water right. We do not consider the question of proprietorship material, since we hold that, even on the theory that a public carrier of water is no more than the mere agent of the State, it nevertheless is authorized to sell water and water rights to its customers. Still, we maintain that the position that there can be no ownership of water in the State of California is wholly untenable. Some confusion has resulted from a failure to distinguish between the provisions of the constitution of California, and those of the constitution of Colorado, relating to water and water rights. The provision of the Colorado constitution to which we have just referred reads as follows :

"The water of every natural stream not heretofore appropriated within the State of Colorado is

hereby declared to be the property of the public, and the same is dedicated to the use of the people of the State, subject to appropriation as herein-after provided."

Section 5. Art. XVI.

No such provision can be found in the constitution of California. A similar provision was offered but rejected. The constitution of Idaho is, in so far as this matter is concerned, practically the same as that of California; and therefore the distinction laid down by the Supreme Court of Idaho between the constitution of Idaho and that of Colorado is directly in point here.

In *Wilterding vs. Green*, 45 Pac. 134, we find a judicial comparison of the two constitutions. The Court said, p. 137:

"Compare section 5 of article XVI of the constitution of Colorado with section 1 of article 15 of the Idaho constitution, which is as follows: 'The use of all waters now appropriated or that may hereafter be appropriated for sale, rental or distribution, also of all water originally appropriated for private use, but which after such appropriation has heretofore been or may hereafter be sold, rented or distributed, is hereby declared to be a public use, and subject to the regulation and control of the State in the manner prescribed by law.' The distinction between the two provisions, it seems to me, is too palpable to require elucidation or warrant discussion. The Colorado constitutional provision recognizes the previous existence of private property rights in the water of natural streams, but prohibits the acquisition of such rights in the future. The Idaho

constitution does not pretend or assume to control or interfere with private property rights in such waters, but declares the use of all such waters, whether theretofore or thereafter appropriated, a public use, and under the control of the State. The doctrine of the Colorado Court, that the canal or ditch owner is a mere 'common carrier', could not, certainly, be predicated upon the provisions of the Idaho constitution. \* \* \* \*  
 The sale, renting and distributing of the water is a dedication, and brings its use under the control of the State, but it in no sense destroys or abrogates the property rights of the appropriator therein."

The debates of the Constitutional Convention of 1879, disclose not only the absence of any purpose on the part of the framers of the California Constitution, to interfere with the right of ownership of waters acquired by appropriation, but also the presence of a clearly expressed determination to leave such rights unimpaired.

In the course of the discussion of the amendment proposed by Mr. Hale, which was adopted and became part of section 1, Article XIV, Mr. Tinnin said:

"This committee has not attempted to take away any private or vested rights. It has simply provided that it shall be subject to State control when it is sold or rented. When an individual or a corporation has a water right, they have individual control of it; but when they attempt to rent or sell it, then we declare that it is a public use subject to legislative control."

Vol. 2 Debates, p. 1021.

Mr. Howard spoke as follows :

" If there is anything settled at all about water—running water—it is that when it is appropriated it becomes private property. The amendment of the gentleman from Placer, Judge Hale, covers the whole question as far as it goes, and that is that when the water is appropriated for sale or rental, that becomes a public use as decided in the elevator cases."

By reference to page 1030, Vol. 2 of the Debates, it will be seen that the following amendment was offered:

" The only property that can be required in any of the waters of this State by appropriation or condemnation is a use, and such use shall forever remain subject to regulation and control by the Legislature of the State for the use and benefit of all."

In commenting upon this amendment, Mr. Estee said, among other things :

" Mr. Chairman, I hope the amendment will not be adopted. The whole thing seems to be harmonious as it stands. Now, the gentleman proposes another section declaring that there is no property in water, that wherever parties have acquired a right it shall be but a use. Now that is contrary to the very principles of the rights of property, as far as appropriation is concerned."

The amendment was lost.

Vol. 2 Debates, pp. 1030-1031.

We repeat then that although the water and distributing plant of an irrigation company may be clothed with a public use, and though the carrying on of the business of selling and distributing the water to the public may be a franchise which can be exercised only



by authority of and in the manner prescribed by law, nevertheless the irrigation company is the owner of its water and its plant ; that in it is vested the title to this property, although the title is held subject to various obligations to the public. Whether or not the duties which the irrigation company owes to the public are inconsistent with the sale of water rights by the company, we will consider hereafter. But here we make the point that if any such objection to the sale of water rights exists, it must rest upon some ground other than the alleged impossibility of ownership of water appropriated to sale, rental and distribution in the State of California.

But even if one engaged in the business of supplying the public with water be regarded as a mere agent of the State, having no proprietary interest in the water distributed, he might, and we contend would, have authority to confer upon a given consumer a water right in the nature of an easement. By reason of this agency he would be authorized to deal thus with the public property entrusted to his management. This proposition is recognized and accepted by the Supreme Court of Colorado in the case of *People vs. Farmer Co.*, 54 Pac. 626.

The power of an irrigation company to make contracts with consumers, as to the terms upon which water shall be furnished, is not taken away by the provisions of Article XIV of the Constitution. A business may be affected with a public interest ; may be subject to

regulation and control; and may involve the exercise of a franchise, and still the transaction of this business may remain within the domain of contract. It is erroneous to assume that because a business is subject to public regulation, no binding contracts can be made concerning it. Such a view is unsupported by authority, and is clearly wrong on principle.

In this connection there is no difference between the business of supplying water and the railroad business, or any other enterprise affected with a public use and involving the exercise of a franchise. They all stand in the same relation to the public, and the power to make all reasonable contracts, not inconsistent with regulations legally imposed, remains and resides in them all.

The power of a railroad company to enter into special agreements with its customers as to the compensation for, and terms upon which, freight or passengers will be carried, has often received judicial recognition.

See *Lough vs. Outerbridge*, 38 N. E. 292; 143 N. Y. 271.

*Kansas Pac. Co. vs. Bayles*, 35 Pac. 744, 22 Pac. 341;

*Thompson vs. San Antonio Ry. Co.*, 32 S. W. 427;

*Hayes vs. Pennsylvania Co.*, 12 Fed. 309;

*Western Co. vs. Newhall*, 24 Ill. 466.

The same power exists in canal companies.

*Del. H. Canal Co. vs. The Penn. Coal Co.*, 21 Pa. St. 131;

*Commonwealth vs. D. & H. Canal Co.*, 43 Pa. St. 295.

And that the same principle applies to the case of companies engaged in supplying the public with water appears from the following cases:

*Wyatt vs. Irrigation Co.*, 33 Pac. 144 (Colo.).

In this case the Court says in reference to a water right contract (p. 147):

"The rights of the respective parties are, therefore, to be measured and determined by the construction of the contracts in question; and the controversy, as above stated, involves only their contractual rights. The status of the defendant company could in no respect affect these rights. Its duty to these plaintiffs would be the same whether that duty was to furnish water under their contracts as proprietor or carrier of water."

In *People vs. Farmers &c. Co.*, 54 Pac. 626 (Colo.), the binding force of a water right contract is expressly recognized, and it is held that the irrigation company may be compelled, by mandamus, to perform. On page 630 the Court, after citing cases in which a statutory duty to furnish water was enforced by mandamus, proceeds thus:

"While the right recognized in these cases was one conferred by statute, which the relator, upon the performance of certain conditions precedent, was entitled to enjoy, we are unable to perceive any reason why the same right, when conferred by contract, is not equally susceptible of enforcement in this manner, when clearly established as in this case, and the consequences of its denial are the same."

In connection with these Colorado cases it is to be

noted that the Constitution of Colorado provides that  
 "the water of every natural stream not heretofore appropriated within the State of Colorado, is hereby declared to be the property of the public, and the same is dedicated to the use of the people of the State."

It further provides that

"the general assembly shall provide by law boards of commissioners in their respective counties, who shall have power when application is made to them by either party interested, to establish reasonable and maximum rates for the use of water whether furnished by individuals or corporations."

Yet the Supreme Court of Colorado, in the cases above cited, recognized the validity of contracts by which the rate of compensation was determined.

In *Spring Valley Water Works vs. Schottler*, 4 S. Ct. 48 (110 U. S. 347) the right of a water company to make contracts with a municipality is recognized by the writer of the majority opinion, who says (p. 52):

"The corporation was created by the State. All its powers came from the state and none from the city and county. As a corporation it can contract with the city and county in any way allowed by law, but its powers and obligations, except those which grow out of contracts lawfully made, depend alone on the statute under which it was organized, and such alterations and amendments thereof as may, from time to time, be made by proper authority."

See also *San Diego Co. vs. Souther*, 90 Fed. 164, where it is held by the Circuit Court of Appeals, in reversing the decree of the Circuit Court, that, under

the California Constitution, the water supplier's compensation can be fixed by contract, prior to the establishment of rates in the mode prescribed by the statute.

The Court said that there is no provision of the Constitution or laws of California and no principle of public policy which inhibits such contracts, and that the use of the water is public only to the extent that the corporation may be compelled to furnish the water, provided it has the capacity to do so, to all who receive and pay for the same, and that the rule of compensation shall be fixed by law in case the parties cannot agree. (90 Fed. p. 170.)

It is proper to add, however, that a rehearing has been granted in this case.

We repeat, then, that there is nothing in the Constitution of California inconsistent with the right of a water company to make binding contracts as to the terms upon which it will furnish water to its consumers. The Constitution itself goes no farther than to make it the duty of an irrigation company to supply water to parties applying for it, upon such terms as the legislature, in the proper exercise of its power of regulation, may impose, or, when no such legislative regulation has occurred, upon reasonable terms. Prior to the making of regulations by the legislature, or by some body or official acting in pursuance of legislative direction, the irrigation company is bound to furnish water upon reasonable terms, and it is for the courts to determine what is reasonable in case of a

controversy between the company and an applicant for water.

*Wilterding vs. Green*, 45 Pac. 134;

*Wheeler vs. Irrigation Co.*, 17 Pac. 487;

See also *C. B. & Q. Ry. vs. Cutts*, 94 U. S. 155.

But this duty to furnish water upon reasonable terms does not conflict with the contractual powers of an irrigation company; for although the company cannot insist upon unreasonable terms as a condition precedent to furnishing water, it is nevertheless open to the customer and the company to agree upon any terms that are mutually satisfactory.

This distinction is pointed out in the case of *Rockland Water Co. vs. Adams*, 24 Atl. 840.

The case of *Wheeler vs. Irrigation Co.* is one of the cases relied on to uphold the assertion that a water rate contract of the kind here in question is repugnant to the rights conferred upon the public by the constitutional declaration that the use of water is a public use. But no such conclusion can properly be drawn from the decision in that case. All that was there decided was that an irrigation company could not refuse to furnish water upon any other conditions except those laid down in a contract whereby the consumer was bound to pay in advance for water to be furnished during a large number of years. It was held that such an exaction was unreasonable, and that the consumer had a right to demand different terms. But it was not even intimated that had the consumer volun-

tarily accepted these terms, the contract would not have been valid and enforceable. This view of the case of *Wheeler vs. Irrigation Co.* is adopted by the circuit court of appeals in *San Diego Co. vs. Souther*, 90 Fed. 164, 170.

We say that, under the California constitution, there is no restriction upon the power of an irrigation company to enter into whatever contracts its consumers are willing to agree to, there being no legislative regulation standing in the way of the contract in question; and that such contracts will be binding on the parties thereto.

The company may, by virtue of the fact that its business is clothed with a public use, be in duty bound to refrain from making contracts with one consumer which it refuses to enter into with others desiring similar contracts. But this principle cannot be invoked to *overthrow* all contracts, whether discriminating or not.

Subject to the limitations above referred to, the constitution has left it to the legislature to determine whether or not there shall be any restriction of the right of irrigation companies to arrange, by means of contracts with their customers, the terms upon which water is to be supplied. It is not made the imperative duty of the legislature to regulate these matters by positive enactments, but it is left free to refrain from actively interposing, and to allow the business of supplying the public with water to be carried on by

means of contractual arrangements, and the enforcement by the courts of the duty to furnish water on reasonable terms. In leaving the matter to be thus adjusted, it merely refrains from exercising its power of regulation, and by implication declares that the method prescribed by law for carrying on the business of supplying water shall be the method of voluntary arrangements between company and consumer, supplemented by the action of the courts in ascertaining and enforcing reasonable terms in event of failure to agree.

There is, of course, a difference between the case of a company furnishing water to the inhabitants of cities and towns and that of a company engaged in supplying the inhabitants of localities outside of these municipalities. The constitution itself imposes upon the governing bodies of cities and towns the imperative duty of fixing water rates, and declares that no individual or corporation shall collect rates other than those thus officially established. While we contend that this provision does not conflict with the right of a water company to contract with its urban customers, for rates different from the official rate, whenever the customer so desires, we need not dwell upon this here, for the reason that the provision in question does not apply to localities outside of municipalities; and the question as to the validity of water rate contracts arises in the present case in connection with the furnishing of water to such localities.

The fact that the constitution makes this distinction



between urban and rural localities is, to our minds, a conclusive indication of a purpose and design on the part of the framers of the constitution, to leave it entirely in the discretion of the legislature to decide whether any fixing of water rates in rural communities, by legislative or official action, should occur.

The debates of the convention clearly disclose the existence of such a purpose; for, in its original form, Mr. Barbour's amendment to Article XIV made no distinction between urban and rural communities, but made the mandatory provision as to the fixing of rates applicable to cities, towns and counties alike. After a discussion, in which the fact that the amendment applied to counties was commented upon, Mr. Barbour asked to correct his amendment by striking out the word county from section one in several places.

*Debates of Convention of 1879, Vol. 3, p. 1372.*

It is apparent from the foregoing and the action of the convention in striking out the word "counties", that it was well understood that the mandatory fixing of rates by supervisors for agricultural communities might not only be undesirable but an objectionable interference with them in carrying on their business, and in diverting, distributing and using water.

It is not necessary for the purpose of this case to determine whether it is within the scope of the Legislature's authority to pass an act prohibiting the adjustment by means of contracts, of the conditions upon which the consumer shall receive water from the irrigation com-

pany. It is enough that no such attempt has ever been made; for the mere existence of the power to establish a system under which no contracts could be made cannot of itself be sufficient to render such contracts invalid. Until the power is exercised, and the prohibitory regulation imposed, the way must still remain open for the adjustment of these matters by means of contracts; and all contracts of this kind would to say the least, be binding until the establishment of some regulation prohibitory of such contracts.

We know of no judicial authority to the contrary of this proposition. The nearest approach to the enunciation of a conflicting doctrine which we have noticed is an intimation made by Judge Ross in delivering the opinion of the Circuit Court in the present case (*Lanning vs. Osborne*, 76 Fed.) to the effect that the water supplied by a quasi public corporation is not so far private property that valid contracts may be made in respect to the rates at which it should be furnished to the consumer. The opinion proceeds as follows (p. 337):

"If the company is a private corporation, and the water private property, this would undoubtedly be so; but if the complainant is a public or quasi public corporation, and the water in question is and at all times mentioned has been charged with a public use, it is not true; for nothing can be clearer than that, in respect to such water, rates established in pursuance of law must control, and that no attempt to ignore that control and to establish them by private contract is of any validity."

It is not clear from the language employed to what extent the learned judge intended to go. But it is hardly to be supposed that he meant to express an opinion to the effect that no one engaged in conducting a business clothed with a public use, can, by means of a contract, bind himself to perform services in the course of such business upon terms defined by the contract. If such was the opinion intended to be expressed it is submitted, with all deference, that it is contrary to all precedent and on principle untenable.

We have thus endeavored to show that water rate contracts are not open to any objection due to the constitution of California or to the general rules of law relative to the subject of water; and will now proceed to inquire whether any valid objections exist by reason of any provision of the statutory law of California.

**The statute law of California is such as to admit of the existence of valid contracts between a water company and its customers fixing the rate of compensation for furnishing water for irrigation.**

In 1880 the Legislature passed an Act by the terms of which the Supervisors of counties were required to fix water rates, during the month of February of each year, and the collection of rates in excess of the maximum designated by the Supervisors was prohibited.

*Stats. 1880, p. 59.*

This Act is somewhat similar to the Act of 1885 (*Stats. 1885, p. 95*); but differs from it in several par-

ticulars, and is, we submit, practically, if not entirely, repealed by the latter Act, which was intended to cover the whole subject matter of the earlier Act, and to establish a new and materially different system for the fixing of water rates in localities outside of cities and towns. The Act of 1880 made it the imperative duty of Boards of Supervisors of their own motion to fix water rates every year, but instead of this, the statute of 1885 provides that upon being petitioned by not less than twenty-five inhabitants who are taxpayers of the county, the Supervisors are authorized and required to fix and regulate the maximum rates at which any person, company, association or corporation having or to have appropriated water for sale, rental or distribution, in each of such counties, may and shall sell, rent or distribute the same. The authority of the Board of Supervisors to fix the rates is made dependent upon the filing of the petition. They cannot, as under the Act of 1880, act without being petitioned. The two Acts are clearly conflicting as to this matter, and cannot stand together. After the rates are fixed they cannot be changed for one year, and then *only as in the Act itself provided*.

Sec. 5.

Section 6 contains the provision as to the method of changing rates, which may be done upon a petition of twenty-five inhabitants, or upon petition of a party engaged in supplying water.

Until the rates are established by the Supervisors, as

in the Act provided, the actual rates established and collected by the persons, companies, associations and corporations furnishing water to the inhabitants are to be deemed and accepted as the legally established rates.

Sec. 5.

These provisions are totally inconsistent with the continued existence of the power or the duty of the Supervisors to fix rates in the manner provided for by the Act of 1880.

The Act of 1885 further provides that water shall be furnished to the inhabitants of a county (other than those of a city or town) at rates *not exceeding the established rate fixed and regulated by the Board of Supervisors of such counties, or as fixed and established by the person, company, association or corporation as provided in the Act.*

Sec. 8.

By section 9 a penalty for collecting rates in excess of the established rates is declared; and section 10 makes it the duty of every party engaged in supplying water to the inhabitants of the county (outside of cities and towns) to furnish water at the established rates (whether fixed by the Supervisors or otherwise) upon a demand and tender of the proper sum of money by any inhabitant, and provides a penalty for refusing or neglecting so to furnish water *to the extent of the reasonable ability of the person or company.*

Such is the statute law\* asserted to be incompatible

\* The Act of 1885 is set out in full in an appendix to this brief. (Infra, p. 79.)

with the validity of water rate contracts by the assailants of such contracts. But no such incompatibility exists.

The theory upon which the lower Court proceeded in the present case appears to be that the rates provided for by the Act of 1885 must be regarded as absolute substitutes for contract rates; that prior to the fixing of rates by the county Supervisors, the supplier of water must establish a schedule rate, and that this schedule rate is exclusive of any special contract rate, whether higher or lower than the schedule rate. Similarly, according to this theory, when the Supervisors have fixed a rate, this is the only legal measure of compensation, and precludes the possibility of a valid special contract rate, whether higher or lower than the rate established by the Supervisors.

It is submitted that such a construction of the Act of 1885 can be made only by ignoring the plain language of the Act, and by reading into the Act a purpose and design which is clearly inconsistent with that language. It is evident, we insist, that the Act of 1885 provides merely for the establishment of *maximum* rates, and that it does not attempt to provide for rates which shall be an absolute substitute for contract rates. If this were not true, why should the power conferred upon Boards of Supervisors have been expressly confined to the fixing and regulation of "*maximum* rates" (See section 2. Stats. 1885, p. 95). Again, why should it have been provided that suppliers of water shall sell, rent

and distribute the same "at rates NOT EXCEEDING the  
 " *established rates fixed and regulated therefor by the*  
 " *Boards of Supervisors of such counties, or as fixed and*  
 " *established by such person, company, association or*  
 " *corporation as provided in this Act* "? (Sec. 8. Italics  
 ours.)

If the Legislature really intended to provide that suppliers of water shall sell, rent and distribute water at no other rate than that fixed by the Supervisors or established by the supplier as in the Act provided, upon what conceivable hypothesis could the legislators have been induced to adopt the phraseology which they did adopt in framing section eight?

The theory that rates established pursuant to the Act of 1885, must operate as an absolute substitute for contract rates cannot be applied without virtually striking out of the Act the portions to which we have referred and interpolating provisions which the Legislature did not insert, and did not intend to insert.

All rates established in pursuance of the Act of 1885, whether by the Supervisors or by the individual or corporation supplying the water, are merely *maximum* rates. Thus, section 2 expressly limits the authority of the Supervisors to the fixing and regulation of *maximum* rates. Section 5 provides that, until rates have been established by the Supervisors, "the actual rates  
 " established and collected by each of the persons, com-  
 " panies, associations and corporations now furnishing  
 " or that shall hereafter furnish appropriated waters for

“ sale, rental or distribution, to the inhabitants of any of  
 “ the counties of this State shall be deemed and accepted  
 “ as the legally established rates thereof”. But it  
 does not follow from this that no special contract rate  
 can be lawful. All that the provision above quoted  
 amounts to is that the rates established and collected  
 by the supplier shall, in the absence of supervisorial  
 rates, constitute the legally established rate. But what  
 is this legally established rate? Is it an absolute sub-  
 stitute for special contract rates, or is it merely a maxi-  
 mum rate? It needs but a glance at section 8 to find the  
 answer to this question in terms so plain that he who  
 runs may read. It is there declared that the supplier  
 shall furnish water at rates *not exceeding* the legally  
 established rates; or—to use the exact language  
 employed—“at rates not exceeding the established  
 “ rates fixed and regulated therefor by the Board of  
 “ Supervisors of such counties, *or as fixed and estab-*  
 “ *lished by such person, company, association or corpora-*  
 “ *tion as provided in this Act.*”

The object of the above quoted provision in section  
 5 is, we submit, no more than to declare that until the  
 Supervisors act, the suppliers may adopt schedule rates,  
 and that when such a schedule rate has been adopted  
 the supplier shall have the right to collect compensa-  
 tion according to that rate, even though the consumer  
 may have had no express understanding with the sup-  
 plier as to the price of the water. Thus, if a consumer  
 applied for water and received the same and nothing  
 was said as to the price to be paid, the supplier could,



nevertheless, collect the schedule rate. But the existence of this schedule rate is not incompatible with the right of supplier and consumer to fix upon a different rate by express agreement. At most, the schedule rate is a mere maximum, just as is a rate fixed by the Supervisors, the only difference being that the supplier can change the schedule at will, which cannot be done with the other rate. The provision in section 8 that the supplier shall furnish water at rates not exceeding the schedule rate is inserted merely for the purpose of preventing the supplier from discriminating against any customer by exacting from him, against his will or without his express consent, more than it is customary to collect from other customers. The schedule rate being at most a mere maximum, there can be no more reason for concluding that it stands in the way of a special contract for a lower rate than there is for so regarding a maximum rate fixed by the Supervisors.

If this proposition is correct, it is fatal to the theory that the rates provided for by the Act of 1885 are to be treated as substitutes for contract rates; for, according to this theory every contract is illegal, whether it exceeds the official or the schedule maximum or not.

We think that this doctrine is unquestionably erroneous, and entirely out of harmony with the language of the Act, and that it cannot be doubted that a contract calling for a rate lower than that fixed by the Supervisors or established by the supplier in pursuance of the Act of 1885, is lawful and enforceable. The opposite posi-

tion is, we venture to say, unprecedented, and in direct conflict with the authorities, which clearly support the position that parties engaged in a business clothed with a public use, and involving the exercise of a franchise, are free to make agreements for a rate of compensation smaller than that established by or in pursuance of law. The decisions which sustain this proposition do not contain any implication to the effect that contracts for compensation greater than the rate fixed by law or in pursuance of law, may not be valid. But they do expressly adopt the view that contracts for special rates less than the legal maximum are binding and enforceable.

In *Delaware & Hudson Co. vs. Penn. Coal Co.*, 21 Pa. St. 131, it is held that though a canal company was forbidden by its act of incorporation, from charging a higher rate of tolls than that specified in the Act, it was not intended to prevent the canal company from charging a less rate. The parties had entered into a contract by which the canal company agreed to allow the coal company to use its canal for transporting coal, for which compensation was to be made by the coal company upon terms specified in the contract. These terms were such as to make it possible that the canal company would receive less than the amount of tolls which it was authorized by its charter to demand; and the canal company sought to have the contract cancelled on the ground that it had no power to bind itself to accept tolls smaller than the legitimate maximum,

and on the further ground that there was no mutuality of obligation. But the Court held that the agreement was binding on both parties, since the coal company was to be treated as having covenanted to pay the agreed rate of toll, and since there was no principle of law in conflict with the power of the canal company to bind itself by contract to take less than the maximum toll. On page 145 we find the following statement:

“The charter prohibits the company from charging a higher rate than that specified; but it was not intended to prevent the canal company from charging a less rate; on the contrary, the lower the rate of tolls, the better for the advancement of the public interest; and we see nothing to indicate that these corporations stand in need of legislative or judicial action to restrain either from neglecting or disregarding its own interests”

The same contract was passed upon again in *Commonwealth vs. Del. & H. Canal Co.*, 43 Penn. St. 295, where it was held that there was nothing in the agreement contrary to law or public policy.

In *Thompson vs. San Antonio Ry. Co.*, 32 S. W. 427, it is held that even where a railroad commission has fixed the rates for a railway company, the company may still make valid agreements to transport goods at a lower rate. The plaintiff had entered into a contract with the defendant, the railway company, by which the company agreed upon the maturing of the plaintiff's crop of watermelons, to furnish cars, and transport the crop to designated points at agreed rates. After the plaintiff had raised his crop the defendant refused to carry

out its agreement, and sought to repudiate the contract. The Court disposed of the matter as follows, (p. 427):

"It is contended by appellee that the contract was void also because it was an agreement to do what appellee was legally required to do, and, by virtue of the effect of the commission act, the contract was without consideration to support it. This position would be entitled to weight if the law was such that a railway could charge for transportation only at some rate previously fixed by the commission, no more and no less. But this is not the statute. The Act, as we understand it, even where rates have been fixed, does not enjoin the railway company from charging a less rate than the commission has named (sections 14 and 15); and therefore, even in cases where the commission has fixed the rates for a railway company, it cannot be said that it is powerless to make contracts for transportation."

The statute to which reference is made in the above quotation is a Texas statute, relating to the regulation of freights and fares and is one of the most strict and severe of its kind.

See *Reagan vs. Farmers, etc.*, 154 U. S. 362.

Section 14 reads:

"If any railroad company subject to this Act, or its agent or officer, shall hereafter charge, collect, demand or receive from any person, company, firm or corporation a greater rate, charge or compensation than that fixed and established by the railroad commission, for the transportation of freight, passengers, or cars, or for the use of any car on the line of its railroad, or any line operated by it, or for receiving, forwarding, handling or

storing any such freight or for any cars, or other service performed or to be performed by it, such railroad company and its said agent and officer shall be deemed guilty of extortion, and shall forfeit and pay to the State of Texas a sum not less than \$100, nor more than \$5,000."

Section 15 defines "unjust discrimination" and imposes a penalty of not less than \$500, nor more than \$5,000, upon any railroad company violating any provision of the section.

Section 17 declares that any railroad company violating the provisions of the Act shall be liable to the persons injured thereby for the damages sustained in consequence of such violation, and in case it is guilty of extortion or discrimination, as defined in the Act, shall pay, in addition to such damages, to the person injured, a penalty of not less than \$125, nor more than \$500.

The suggestion in the foregoing extract from the opinion in *Thompson vs. San Antonio Ry. Co.* to the effect that a different result might be reached, *if the law was such* that a railway could charge for transportation only at some rate fixed by the commission, *no more and no less*, cannot be taken as an intimation that the existence of a statutory maximum rate is necessarily inconsistent with a higher special contract rate. The Court refers not to a mere maximum, but to a specific prohibition of any contract rates.

In the opinion of the Court in *Kellerman vs. Railroad Co.*, 34 S. W. 41, we find a judicial recognition of the possibility of the coexistence of a statutory max-

imum freight rate, a published schedule rate, and a rate fixed by special contract.

In this connection we would call attention to the following cases, in which it is held that a transportation company may make special contracts for transporting goods upon terms different from those provided by the regular schedule of rates.

*Kansas Pac. Co. vs. Bayles*, 22 Pac. 341, S. C. 35, Pac. 744;

*Lough vs. Outerbridge*, 38 N. E. Rep. 292, 143 N. Y. 271.

If it be suggested that if a contract calling for a rate lower than the official maximum were recognized as valid and binding, the subsequent establishment of an official maximum lower than the contract rate, could not affect the contract, and that in this way the authority of the supervisors might be set at naught, we answer that, even were it conceded that the purpose of the Act of 1885 was to prohibit all contract rates in excess of the maximum established in pursuance of the Act, it would not follow that contract rates might not be enforceable until the maximum was fixed at a lower figure.

But we do not admit that a contract rate higher than the maximum established under the Act of 1885 is repugnant to that Act.

We maintain that the requirement of the Act of 1885 that water shall be furnished at rates not exceeding the maximum established by order of the county supervisors, or by the schedule adopted and observed

by the supplier, is to be understood as confined to cases where no special rate has been fixed by contract. If the consumer prefers to take the water at the official or schedule rate, or if, for any other reason, no special rate is agreed upon, then the supplier can demand no greater compensation for water furnished than that fixed by the official rate or by the schedule rate, as the case may be. But it is altogether different where the consumer prefers to contract for a special rate which secures to him the advantage of freedom from the fluctuations characteristic of official and schedule rates, and which may be higher than these rates without offending either the letter or the spirit of the Act of 1885.

The object of the statutory provision that the supplier of water shall not collect excessive rates or refuse to furnish water at the established rates, is not to curtail the right of a consumer to enter into any agreement that he desires to adopt; but rather to arm him with the right to compel the supplier of water to furnish water at the established rates, and upon the established terms, *if the consumer prefers this arrangement to any other which he and the supplier can agree upon.* To prevent extortion; to preclude the possibility of the exaction of excessive compensation *against the will of the consumer*, by a refusal to furnish water on any other terms, was the end sought to be achieved by the legislation in question. The law having thus equipped the consumer with the power to demand water at the established rate, all danger of oppression by the supplier was

obviated; and the consumer could, in perfect safety, carry on negotiations and make bargains with the supplier, since the latter was no longer in a position to say to him, "you must take my terms or none". What reason, then, could there be for forbidding the consumer to make any agreements with the supplier that he might see fit to make, and might desire to make? What possible advantage was there to be attained by confining the consumer to the rates and terms fixed by a board of supervisors, even though he might wish to adopt a different arrangement? We submit that there could be none.

In *South Boulder Co. vs. Marbell*, 25 Pac. (Colo.) 504, the Supreme Court of Colorado recognizes the principle that the fixing of water rates by public authority does not preclude the making of special contracts respecting the rates and terms upon which water shall be supplied. The special contract there in question was one by which an irrigation company promised to furnish a consumer a certain amount of water, year after year, at an annual rental fixed by contract. This rental was higher than the maximum rate fixed by commissioners, acting under the authority of a statute, like the California act of 1885. The Court said (p. 506):

"Nor does the action of the commissioners in pursuance of the statute prevent consumers from making special contracts with the carrier regarding the rate, or from continuing under agreements already existing."

An analogous case is found in that of the liability of



a common carrier as an insurer of goods transported by it. For example, a railroad company is under a legal duty to act, to a certain extent, as an insurer of the safety of the goods which are entrusted to it for transportation. The company cannot refuse to carry the goods, nor insist upon exemption from liability as an insurer, as a condition precedent to accepting the goods for carriage. Yet, if the shipper desires to make special terms, and, in consideration of lower rates, or some other advantage, to agree that the railroad company shall not be liable as an insurer, there is no law or public policy to prevent such an agreement.

*Western Trans. Co. vs. Newhall*, 24 Ill. 466, 469, 473.

We contend that the statutory prohibition of the collection of rates exceeding the established maximum is on all fours with the common law prohibition of the carrying of freight by a common carrier otherwise than as an insurer. Both restrictions are imposed for the benefit of the customer, and may be waived by him if he considers it to his advantage so to do.

Another analogy is found in the case of a constitutional provision designated for the protection of the property of the citizen. It is competent for the citizen to waive the protection and consent to such action as would be invalid if taken against his will.

*Endlich on Interpretation of Statutes*, Sec. 537,  
quoting *Cooley on Constitutional Limitations*;  
*Robinson vs. Bidwell*, 22 Cal. 379;  
*Harrelson vs. Barrett*, 99 Cal. 607.

We are not unmindful that it is often insisted that the statute of 1885 was passed with a view to protect the rights of the public, and that therefore an individual consumer cannot have the power to waive the limitations imposed by these laws upon suppliers of water. The right of the public thus referred to is the right to be protected from discriminating and speculative contracts between the supplier and favored consumers.

It is submitted that it is unreasonable to contend that because contracts may be so drawn as foster discrimination, monopoly and speculation, it must be presumed that the Legislature intended, when it passed the Act of 1885, to sweep away all water contracts and all right to contract with reference to water. It seems to us that the presumption should be against the existence of an intention to adopt so drastic a measure.

It may be the duty of a water company to refrain from unreasonable discrimination between different applicants for water. But it is nevertheless true that special circumstances may justify special contractual arrangements, and that in such cases there may be such a thing as reasonable discrimination.

*Kansas Pac. Co. vs. Bayles*, 22 Pac. Rep. 341 ;

*Lough vs. Outerbridge*, 38 N. E. Rep. 292 ; 143 N. Y. 271 ;

*Commonwealth vs. Canal Co.*, 43 Pa. St., 295.

Nor is it reasonable to contend that because water rate contracts may be so framed and so used as to foster the holding of water for speculative purpose, therefore it

must be presumed that the policy of the Act of 1885 is antagonistic to all water rate contracts.

Condemning contracts of this type merely because it is possible to make a contract the instrument of unreasonable discrimination, or of speculation and monopoly—instead of simply forbidding undue discrimination and prohibiting the withholding of water from those who need it by those who seek to keep it, not for use, but for speculative purposes—is a policy which we think should not lightly be attributed to a Legislature.

If it should happen that, in time of scarcity, the contract holders should need all the water which the company could furnish, and that, consequently, other applicants for water could not get any, the situation would not present the case of an unreasonable monopoly. Practically the same situation would exist in the absence of any special contracts; for under section 552 of the *Civil Code*, the owner of lands on the line of the company's ditch, who has been furnished water by the company is entitled to the continuous use of said water in preference to later applicants.

*Price vs. Riverside L. & I. Co.*, 56 Cal. 431.

We repeat, then, that the fact that the right to contract with reference to water rights and water rates is susceptible of abuse, can furnish no reason for the presumption that the constitutional and statutory provisions relating to water were intended to operate as a

prohibition of all contracts concerning water and water rates.

In connection with the question as to the proper construction of the Act of 1885, we would direct the attention of the Court to the conspicuous dissimilarity between the language of the Act of 1885 and that of section 1 of Article XIV of the Constitution of California relating to the mode of fixing rates in municipalities. The constitutional provision contains a declaration that any supplier of water collecting water rates in any city and county or city and town, otherwise than as established by the governing body thereof, shall forfeit its franchise and water works. We do not admit that this is intended as a prohibition of voluntary agreements for rates different from the official ones, but even were it conceded that the language used might bear such a construction, it would still be true that, as we have already shown, the language of the Act of 1885 is entirely incompatible with the conclusion that the Act was designed to prohibit special contract rates. The Act clearly stops short of such a result, and goes no further than to provide for the establishment of maximum rates; and this we contend must remain true even though the constitutional provision should be construed as prohibitive of special contract rates.

The theory that the Constitution of California and the statute of 1885 are prohibitive of water rate contracts, if consistently followed out, leads to the con-

clusion that no valid contract can be made concerning services rendered by any individual or corporation in the course of a business which is charged with a public use, and which involves the exercise of a franchise. According to this contention, if a railroad company should sell a passenger a ticket for a sum less than that fixed by the Board of Railroad Commissioners, the ticket would be void and the passenger could be put off at any station on the line, and the railroad company be under no liability therefor.

Similarly, if a canal company desired a right of way over lands or a right to construct reservoirs thereon, and wished to agree to furnish water to the particular lands in question free, in consideration of a grant of the right of way, or of a reservoir site, or of both, the plan could not be carried out and the attempted contract would be void; and even though the land owner should allow the canal company to construct upon the land its canal or reservoir, or both, the company could not be compelled to furnish water in accordance with its promise. Such a doctrine is revolutionary, and it would overturn rights which have never yet been questioned. Such contracts have been treated as valid by the Supreme Court of California (see *Ferrea vs. Chabot*, 63 Cal. 564); and we think that the Court will take judicial notice of the fact that in numerous instances water companies have acquired rights of way and other privileges of great value, upon the faith of promises to furnish the land owner with water free of charge or at a specified charge.

If a railroad company should agree to furnish a pass in consideration of a right of way or a concession as to freight or any matter of that kind, the same would, according to the doctrine in question, be absolutely prohibited and void. No commutation ticket, no return ticket or any other limited ticket at a rate less than that fixed by law could be valid, because as soon as public control steps in the right of contract steps out, and every attempt to contract is void from the beginning.

If it is true that the Act of 1885 operates as a prohibition of special contracts with regard to water rates, then all statutes providing for the fixing of maximum railway rates for freights and fares must be prohibitive of special contract rates.

If all contracts for water rights and for special water rates are unlawful merely because such contracts may be so drawn as to be promotive of speculation, discrimination and monopoly, then it must be that all contracts for special railway rates, and all contracts determining the amount of compensation for services rendered in the course of any business affected with a public use, and involving the exercise of a franchise, must be unlawful and void. For in all such cases it could just as forcibly be argued that contracts may be framed in such a way as to tend towards discrimination, speculation and monopoly.

We say, then, that all of the arguments in support of the proposition that there is a fatal antagonism be-

tween a contract for special water rates and the constitution and statutes of California, apply with equal force to the case of any business affected with a public use and subject to State regulation; and that a consistent application of the theory relied on to overthrow water rate contracts would result in the destruction of all contracts made in connection with any of these quasi-public enterprises.

We submit then that there is nothing in the Act of 1885, as originally adopted, which conflicts with the validity and legality of a contract fixing water rates, and this whether the contract rate be greater or less than the maximum fixed by the county supervisors or by the supplier, pursuant to the Act.

We now proceed to another consideration which is fatal to any objection to water rate contracts based upon the Act of 1885, and this is that

**Even if the Act of 1885 as originally enacted could be construed as rendering contracts relating to water rights, illegal and contrary to public policy, this supposed taint of illegality was removed by the amendment of 1897, and thereby all such contracts became lawful and enforceable.**

As we have already shown, the Act of 1880 was superseded by the Act of 1885, and the latter act is therefore the only one which can be relied on as constituting an obstacle to the enforcement of water rate contracts.

But on March 2nd, 1897, the Act of March 12th,

1885, was amended by the insertion of a new section, numbered 11½, and which reads as follows:

“Nothing in this Act contained shall be construed to prohibit or invalidate any contract already made, or which shall hereafter be made, by or with any of the persons, companies, associations or corporations described in section two of this act, relating to the sale, rental or distribution of water, or to the sale or rental of easements and servitudes of the right to the flow and use of water; nor to prohibit or interfere with the vesting of rights under any such contract.”

(Stats. 1897, p. 49).

The amendment is a declaration of the legislative policy from that time forth, with respect to existing as well as to future contracts; a declaration that whatever may have been the policy underlying the Act of 1885 as originally adopted, the prevailing policy from and after the time of this amendment, should be in favor of the validity of these contracts, and that even such of them as antedated the amendment should be enforceable, and free from the imputation of being contrary to the policy of the law.

It is true that a Circuit Court in a ruling made in the present case (*Lanning vs. Osborn*, 82 Fed. 577) declined to construe the amendment of 1897 as intended to validate contracts void when made. According to the view adopted by Judge Ross, the amendment did not purport to impart validity to any contract already made. He says, (p. 577):

“The amendment does not purport to provide any manner of fixing water rates, nor does it



purport to make valid any contracts otherwise invalid."

But the construction which Judge Ross puts upon the amendment practically robs it of all significance, in so far as existing contracts are concerned.

It is evident that the amendment was intended to have some effect upon contracts already made; otherwise no reference to contracts "already made" would have been included in the amendment. And we submit that the purpose of the amendment of 1897 was not merely to announce the construction placed by the legislature of 1897 upon the Act of 1885, but in addition to this, to remodel the Act of 1885 so as to preclude the possibility of its being construed so as to conflict with contracts of the kind referred to in the new section.

This construction of the language of the amendment is one which that language will bear without any straining, and is in fact the only one that can be adopted without ignoring its express language. The declaration that nothing in the Act of 1885 should be construed so as to conflict with certain contracts, is an expression of the legislative will as to what the effect of the Act shall be. This form of expression is very common in cases where it is used with reference to the effect of the same Act in which it is found, and there is no reason why a different significance should attach to it in cases where it is used with reference to a prior act. It is submitted, then, that, whether or not the amend-

ment purports to make valid any contracts otherwise invalid, it does purport to enact that nothing in the Act of 1885 shall operate to interfere with the enforcement of contracts already made which, apart from that Act, would have been valid. If the effect of the Act of 1885, as originally adopted, was to render the water right contracts unenforceable and obnoxious to the public policy (which of course we deny), the enactment of 1897 removed this impediment and changed the statutory policy with respect to such contracts; provided, of course, that it was within the power of the legislature to pass a statute having such a retroactive effect as that just indicated.

Thus arises the question of whether there is anything in the Constitution of the United States, or the constitution of California which precludes the legislature from validating contracts which at the time of their inception were in conflict with the statutory policy of the state. We contend that there is not; and that even if the contracts here in question were, when made, obnoxious to some policy established by the Act of 1885, the amendment of 1897 was intended to, and did, remove this ground of objection to their validity and binding force.

A law validating invalid contracts does not impair the obligation of a contract, but confirms the contract.

*Watson vs. Mercer*, 8 Peters 88;

*Satterlee vs. Matthewson*, 2 Peters 380.

Where parties have entered into an agreement which

at the time of its inception was illegal, and in contravention of public policy, such an agreement becomes enforceable when the legislature sees fit to change the policy of the law, and to extend a legal sanction to transactions of a kind formerly reprobated and condemned. No one can have a vested right to repudiate his contract; and when, by a change of statutory policy, that which was illegal becomes legal, the enforcement of a contract formerly unenforceable because illegal and contrary to public policy, does not deprive the contracting party of a vested property right, but amounts to no more than compelling him to fulfill an obligation voluntarily assumed, and therefore morally binding.

To remove from a contract the taint of illegality is not to create a new contract; it is merely to withdraw a ground of objection which is founded upon the policy of the state, and which therefore can continue to exist only so long as the legislative power of the state consents to the continuance of the policy in question. Any policy which is not established by the constitution itself, is subject to change at the will of the legislature; and in so far as any objection to the contracts involved in the case at bar was based upon the policy established by the statutes of 1885, that objection was removable by the legislature at its pleasure; and, the objection having been removed, the contract stands just as if the objection, and the public policy to which it owed its origin, had never existed.

An examination of the decisions bearing upon this question will show that the position which we have just defined is well supported by authority.

In *White Water Co. vs. Valette et al.*, 21 How. (U. S.) 425, the rule is stated thus: .

"The objection that a contract is illegal, and that no judgment can therefore be rendered upon it, is not allowed from any consideration of favor to those who allege it. The Courts, from public considerations, refuse their aid to enforce obligations which contravene the laws or policy of the State. When the Legislature relieves a contract from the imputation of illegality, neither of the parties to the contract are in a condition to insist on this objection."

In that case, a corporation which had issued bonds secured by mortgage, sought to avoid the enforcement of the mortgage agreement on the ground that the contract in pursuance of which the bonds were issued, was obnoxious to the usury laws, and also on the ground that the corporation had no power, under its charter, to issue bonds secured by mortgage. It was held that, whatever doubts might have existed as to legality of the issue of the bonds, were disposed of by an Act of the State Legislature legalizing the bonds.

In *Ewell vs. Daggs*, 108 U. S. 143, it is held that a law which repeals usury laws, and destroys defenses to existing contracts on the ground of usury, does not deprive parties of vested rights, nor impair the obligation of contracts.

The Court held that a usurious contract was not an

absolute nullity, incapable of giving rise to any rights or obligations under any circumstances; that the effect is the same, if the contract is, in fact, illegal, as made in violation of a statute, whether the statute declares it to be void or not; and that all that could be meant by the term "void and of no effect" as used in the usury statute, is that a Court of law will not lend its aid to enforce the performance of a contract which appears to have been entered into by both the contracting parties, for the express purpose of carrying into effect that which is prohibited by the law of the land.

The opinion proceeds as follows:

\* \* \* "Independent of the nature of the forfeiture as a penalty, which is taken away by a repeal of the Act, the more general and deeper principle on which they are to be supported is, that the right of a defendant to avoid his contracts is given to him by the statute, for purposes of its own, and not because it effects the merits of his obligation; and that, whatever the statute gives, under such circumstances, as long as it remains in *fieri*, and not realized, by having passed into a completed transaction, may by a subsequent statute be taken away. It is a privilege that belongs to the remedy, and forms no element in the rights that inhere in the contract. The benefit which he has received as the consideration of the contract, which contrary to law he actually made is just ground for imposing upon him, by subsequent legislation, the liability which he intended to incur. \* \* \*

The right which the curative or repealing Act takes away in such a case is the right in the party to avoid his contract, a naked legal right which it is unjust to insist upon, and which no constitutional provision was ever designated to protect."

In *Town of Danville vs. Pace*, 25 Gratt. 1, the subject of the constitutionality of retrospective statutes affecting the defense of usury is exhaustively discussed. It is held that although a usurious contract is, under the usury law there involved, void both as to principal and interest, the Legislature could nevertheless render the demand enforceable by repealing the usury law, concerning the contention that the repealing law, (which was clearly intended to be retroactive), was in conflict with the State Constitution, the Court said (page 11):

"I do not understand the learned counsel for the defendant as contending that the Act in question violates any specific provision of that instrument. His proposition is substantially, that the contract here, when made, was usurious and void; and there was then vested in the defendant a right so to declare it; that by the statute now under consideration, he has been deprived of this right; that a law which thus takes away a valuable and a vested right is an arbitrary power, unjust in itself, and contrary to the fundamental principles of the social compact."

The opinion then goes on to review the authorities, and proceeds as follows:

"The usury laws are founded upon considerations of public policy. They are modified from time to time, and even abolished, as the popular sentiment may dictate, or the public interest require. \* \* \* \* \*

"Unless we suppose it is the deliberate purpose of the debtor, when he borrows the money, never to return it, the only effect of the statute is to compel him to do what he intended and agreed to do at the time of entering into the contract. It is a

legislative declaration that the forfeiture shall not be enforced. It leaves the contract to be executed according to its terms and the original intention of the parties. It violates no vested right, unless it be considered as a vested right of the loaner to vacate his contract and annihilate his debt. Clearly this is not the kind of right the constitution was designed to protect."

It is further decided in this Virginia case, that an act repealing a usury law is not open to the objection that it is an attempted exercise of judicial functions by the Legislature.

In *Andrews vs. Russell*, 7 Blackf. (Ind.) 474, it is held that, although a contract for the payment of illegal interest may be void while the prohibiting statute is in force, it is within the power of the Legislature to give force and obligation to the contract by means of a retroactive law.

To the same effect are :

*Curtiss vs. Leavitt*, 15 N. Y. 9;

*Woodruff vs. Scruggs*, 27 Ark. 26;

*Welch vs. Wadsworth*, 30 Conn. 149.

The analogy between a usurious contract and a contract for the sale of water for rates fixed in a manner not allowed by law, is very close. The water contract is no more a matter of public concern than the usurious loan. If public policy is involved in one case it is just as clearly involved in the other. If a water contract is illegal because the statute does not sanction, but on the contrary prohibits, the fixing of the rate of compensation by means of a contract, in the same way

a contract tainted with usury is illegal, and lacks the sanction of law and is prohibited by law. And if a party to a usurious contract has no vested right to insist upon its illegality as a defense, it follows that no such right can be vested in a party to an illegal water contract.

Another analogous case is that of a corporation which is forbidden by law to make certain contracts within a State. A contract may be within this inhibition and nevertheless the Legislature may, without violating any constitutional restriction, withdraw the inhibition, and thus render the contract enforceable, though it was made in violation of the law.

The decision in *Gross vs. U. S. Mortgage Co.*, 108 U. S. 477, is based upon this principle, as the following extracts from the opinion will show :

“ The opinion of the State Court (93 Ill. 483) in this case, shows that the decree is based upon these grounds: 1. That the law of Illinois in force when the mortgage of August 22, 1872, was executed, as well as its public policy, as disclosed in legislative enactments for many years prohibited the United States Mortgage Company from taking mortgages upon real property in that State, to secure the repayment of money loaned; consequently that no title passed to it under or by virtue of that mortgage. 2. That such mortgage, was however, validated by the act in force July 1, 1875.

“ That the act in question is not repugnant to the constitution as impairing the obligation of a contract is, in view of the settled doctrine of this Court, entirely clear. Its original invalidity was placed by the Court below upon the ground that



the statutes and public policy of Illinois forbade a foreign corporation from taking a mortgage upon real property in that State to secure a loan of money. Whether that inhibition should be withdrawn was, so far at least as the immediate parties to the contract were concerned, a question of policy rather than of constitutional power. When the legislative department removed the inhibition imposed as well by statute as by the public policy of the State upon the execution of a contract like this, it cannot be said that such legislation, although retrospective in its operation, impairs the obligation of the contract. It rather enables the parties to enforce the contract which they intended to make. It is, in effect, a legislative declaration that the mortgagor shall not, in a suit to foreclose the lien given by the mortgage, shield himself behind any statutory prohibition or public policy which prevented the mortgagee at the date of the mortgage, from taking the title which was intended to be passed as security for the mortgage debt."

The Court further held that the law in question was not open to the objection that it deprived the mortgagor (or the assignee of the mortgagor, who had assumed the mortgage), of property without due process of law.

*Bleakney vs. Bank*, 17 S. & R. 63, was an action by the bank upon a promissory note of date January 20th, 1820. The Supreme Court of Pennsylvania upheld the decision of the lower Court to the effect that by the omission of the plaintiff to pay the six per cent. tax on the dividend of November, 1819, the charter of plaintiff was forfeited, and the bank was dissolved, and rendered

unlawful and unincorporated; and every note taken by said bank after the first Monday of January, 1820, was null and void; but that the Act of April 1st, 1822, restored the bank and legalized the notes.

The Supreme Court said (p. 65):

“ This law divests no right, but removes an impediment or disability; it renders lawful an act prohibited, as if it had been lawful *ab initio*; it works no injustice; infringes no man's right; it impairs no contract; but takes from the contract the taint which the policy of the law interposed, and gives to the holder of the note a right to recover on the contract; a right which he would have possessed if there had been no legislative interposition; the party is restored to his common law right and common law remedy.”

To the same effect is *Hess vs. Werts*, 4 S. & R. 356, a case concerning notes issued by a corporation not incorporated for banking purposes, which notes were by statute declared to be absolutely null and void, and to have no effect either in law or equity, and to be irrecoverable in any Court within the commonwealth. The defendant corporation, when sued upon certain of its notes, set up the defense that these notes were void, although after their issuance the Legislature had enacted that

“ so much of any act of the assembly heretofore passed, as deprives or prevents the holder of any note, ticket or engagement of credit, in the nature of a bank note from recovering from any individual, bank or corporation, association or partnership, by whom, or by any of whose officers or agents, the same has been made, signed or issued,

by reason of such note having been made, signed or issued without, or in contradiction to law, be, and the same is hereby repealed; and the holder of every such note shall have the same legal remedy for the recovery of the amount thereof, from the party or parties, whether corporate association, or partnership, or individual, who made, signed, or issued the same, as can, by the provision of this Act, or by the existing law of this commonwealth, be had on a similar note, ticket or engagement of credit, that has been lawfully issued."

The opinion of the Court contains the following (p. 358):

"The defendants contend, that by the Act of 1814, the contract was rendered void; and that it was not competent to the Legislature to create, by its repeal, a new contract for the parties, which, in point of law, had no previous existence. It certainly never was in the view of the Legislature to make a new contract, nor have they done so. The object of the Act of 1814 was, among other things, to restrain the circulation of the notes of unlawful banking associations; and for this purpose, notes are declared void." \* \* \*

"I consider the case, therefore, on the broad ground of the contract having been void when made, and of no new contract having arisen since the repealing act. But by rendering the contract void it was not annihilated. The object of the Act of 1814 was not to vest a right in any unlawful banking association, but directly the reverse. The motive was not to create a privilege, or shield them from the payment of their just debts, but to restrain them from violating the law by destroying the credit of their paper, and punishing those who received it. How then can the defendants complain? As unauthorized bankers, they were violators of the law; and objects, not of protection,

but punishment. The repealing act was a statutory pardon of the crime committed by the receivers of this illegal medium. Might not the Legislature pardon the crime without consulting those who committed it; or does it lie in the mouth of another culprit, *particeps criminis*, to object, on the ground of impairing his interest, in having the punishment inflicted, when that interest arose from a violation of the very law under which he attempts to cover himself? How can the defendants say there was no contract, when the plaintiff produces their written engagement for the performance of a duty binding in conscience, though not in law? Although the contract for reasons of policy was so far void, that an action could not be sustained on it, yet a moral obligation to perform it, whenever those reasons ceased, remained, and it would be going very far to say the Legislature may not add a legal sanction to that obligation, on account of some fancied constitutional restriction."

Another instance of the validating of an illegal contract by a subsequently enacted statute is found in the case of a contract made in violation of laws against gaming.

In *Washburn vs. Franklin*, 35 Barb. 599, it is held that the defense to a contract, given by the statute against stock jobbing, might be taken away by a statute passed after the contract in question was made; and that a party to the contract had no vested right in the defense which the legislature could not take away.

This case is cited with approval by the Supreme Court of the United States in *Little Rock vs. Bank*, 8

Otto (98 U. S.) 308, as supporting the proposition that

“where the consideration of a contract is morally good a repeal of the statute will validate the contract.”

In *McMahon vs. Bohen*, 39 Conn. 316, it is held that it is within the power of the legislature to validate, by a subsequent statute, a contract which was originally unenforcible, because in violation of a law prohibiting the sale of intoxicating liquors.

In *People vs. Los Angeles Ry. Co.*, 91 Cal. 338, it was decided that the legislature may ratify and confirm a street railway franchise granted to a corporation upon terms not allowed by the law, as it stood at the time of the grant. At the time of the grant in question, section 497 of the *Civil Code* did not permit the granting of a franchise to operate a street railway by electric power. Subsequently the legislature passed an act confirming and ratifying ordinances granting such franchises. It was held that this validated the franchise in question.

Other instances of the validating of contracts by retroactive laws are found in the following cases:

In *Shaw vs. R. R. Co.*, 5 Gray 179, it was held that a mortgage by a corporation, of its franchises and property, might be validated by a statute passed after the execution of the mortgage, even though it may have been unlawful for the corporation to mortgage its franchises.

In *Dentzel vs. Waldie*, 30 Cal. 138, it is held that

a power of attorney to sell land made by a married woman at a time when the law did not permit married women to convey their separate property by an attorney in fact, was originally invalid and a deed by the attorney was likewise invalid ; but that the legislature had the power to validate such powers of attorney and conveyances made thereunder. The Court said (p. 145):

“The act in question does not divest the plaintiff of her title to the land in controversy. On the contrary it gives effect to the contract made by her fairly and in good faith by which she intended but failed to pass the title to another, merely because the proper legal forms were not observed. The same will which prescribed those forms has said that a non-compliance therewith shall be waived or excused, and the act held valid notwithstanding, and we find no constitutional impediment in the way.”

We consider that the foregoing authorities fully justify the position that the amendment of 1897 had the effect of relieving all water-rate contracts from any taint of illegality which may have previously existed, although we of course deny that any such taint ever did exist.

The analogy between the law of 1885 and a usury law is very close. The object of both is to prevent extortion. To effect this end the law of 1885 prohibited the collection of water rates in excess of the maximum fixed in pursuance of law. Similarly the usury law prohibits the making of contracts for more than the legal rate of interest. The difference between the two laws is that the usury law does not

give the borrower the right to demand a loan at the legal rate, while the Act of 1885 does confer on the consumer the right to demand and receive water at the legal rate. Thus the Act of 1885 should not be construed as forbidding the making of contracts for water at a higher rate than the legally established one, since this is not the method of preventing extortion adopted by that act. That method is to give the consumer the right to demand water at the rate legally fixed, and this right is a complete bar to any possibility of extortion. On the other hand, the method of preventing extortion adopted by the usury law was merely to take away from borrowers the power of binding themselves to pay an excessive rate. If a usury law should be framed on the plan of giving the borrower the right to demand and compel a loan at the legal rate, there would be no necessity for construing it as a prohibition of contracts for a higher rate; for such contracts cannot be the result of oppression when the lender has no power to compel the borrower to agree to the higher rates on pain of being refused any loan whatever.

A usury law is thus very different from the Act of 1885 relating to water rights, in the respect which we have just indicated, and we direct attention to this difference to avoid the implication that because a usury law is very closely analogous to the Act of 1885, the latter Act should be construed as giving a defense to a party to a contract for water rates higher than those established by law. But the two laws are very similar

in other respects. Their object is the same—the prevention of extortion—and both are expressive of the same public policy.

In the case of the supplier of water, just as in the case of the supplier of money, the policy of the law is to prevent the supplier from taking an undue advantage of the necessities of the parties to whom the water or money is to be supplied.

The usury law is based upon consideration of public policy to the same extent that the law regulating water rates is based upon public policy. This is apparent from a consideration of the reasoning in *Munn vs. Illinois*, by which the Court reached the conclusion that a business affected with a public use is subject to legislative regulation. The case of usury laws was relied on as one of the illustrations of how a business can be affected with a public use, and the usury laws were relied upon as examples of the regulation of a business on considerations of public policy.

We therefore repeat that if there ever was any valid objection to the water rate contracts on account of their being opposed to the provisions of the Act of 1885 (which of course, we do not admit), every such objection was completely removed by the amendment of 1897.



**A contract fixing the rate of a water supplier's compensation is supported by a valid and adequate consideration ; it is not nudum pactum.**

If the contract rate is less than that established by the Supervisors or the water company, there is clearly a consideration moving to the consumer ; since he secures, by the contract, a rate more advantageous than that at which the supplier is already under a legal obligation to furnish water.

If the contract rate is higher than that fixed by the Supervisors or by the supplier's schedule, there is still a consideration for the consumer's promises.

Under the contract the rates are stable, reliable, unvarying. Apart from the contract the rates to which the consumer is entitled must be uncertain, fluctuating and unreliable. Protected by the contract the consumer can be assured that, no matter how high the rates may be raised by the Supervisors, he can always have his water at the same rate, and can always be in a position to estimate with accuracy the expenditures which in the future, he will find it necessary to make in connection with the irrigation of his land. It cannot be that this certainty and security and uniformity is of no value ; or that it can be regarded as of such infinitesimal importance that its presence cannot save a contract from the fate of a *nudum pactum*.

On the contrary it is evident that this right to uniform and unvarying rates is, of itself sufficient to constitute an adequate consideration.

In conclusion, we invite attention to the fact that, for all that the record in the case at bar discloses, it may be that the San Diego Land and Town Company is the owner of water which was appropriated prior to the adoption of the Constitution of 1879. It is submitted that it should be presumed that such is the case, until the contrary is shown. This matter has a direct bearing upon the question whether an irrigation company can, under the Constitution of 1879 be the *proprietor* of the water which it sells, rents and distributes. There can be no doubt that such a proprietorship was possible under the California Constitution of 1849, and the new constitution could not have the effect of destroying rights vested under the old constitution, since this would be in violation of the provisions of the Fourteenth Amendment to the Constitution of the United States.

Respectfully submitted,

JOHN GARBER and  
FRANK H. SHORT.

*Amici Curiae.*

## Appendix.

*An Act to regulate and control the sale, rental, and distribution of appropriated water in this State, other than in any city, city and county, or town therein, and to secure the rights of way for the conveyance of such water to the places of use.*

[Approved, March 12, 1885.]

*The People of the State of California, represented in Senate and Assembly, do enact as follows:*

SECTION 1. The use of all water now appropriated, or that may hereafter be appropriated, for irrigation, sale, rental, or distribution, is a public use, and the right to collect rates or compensation for use of such water is a franchise, and except when so furnished to any city, city and county, or town, or the inhabitants thereof, shall be regulated and controlled in the counties of this State by the several Boards of Supervisors thereof, in the manner prescribed in this Act.

SEC. 2. The several Boards of Supervisors of this State, on petition and notice as provided in section three of this Act, are hereby authorized and required to fix and regulate the maximum rates at which any person, company, association or corporation, having or to have appropriated water for sale, rental, or distribution, in each of such counties, may and shall sell, rent, or distribute the same.

SEC. 3. Whenever a petition of not less than twenty-five inhabitants, who are taxpayers of any county of this State, shall, in writing, petition the Board of Supervisors thereof, to be filed with the Clerk of said Board, to regulate and control the rates and compensation to be collected by any person, company, association, or corporation, for the sale, rental, or distribution of any appropriated water, to any of the inhabitants of such county, and shall in such petition specify the persons, companies, associations, or corporations, or any one or more of them, whose water rates

are therein petitioned to be regulated or controlled, the Clerk of such Board shall immediately cause such petition, together with a notice of the time and place of hearing thereof to be published in one or more newspapers published in such county; and if no newspaper be published therein, then shall cause copies of such petition and notice to be posted in not less than three public places in such counties, and such publication and notice shall be for not less than four weeks next before the hearing of said petition by said Board; such notice to be attached to said petition shall specify a day of the next regular term of the session of the said Board, not less than thirty days after the first publication or posting thereof, for the hearing of said petition, which shall impart notice to all such persons, companies, associations, and corporations, mentioned in such petition, and all persons interested in the matters of such petition and notice. Such Board may also cause citations to issue to any person or persons within such county, to attend and give evidence at the hearing of such petition, and may compel such attendance by attachment.

SEC. 4. At the hearing of said petition the Board of Supervisors shall estimate, as near as may be, the value of the canals, ditches, flumes, water chutes, and all other property actually used and useful to the appropriation and furnishing of such water, belonging to and possessed by each person, association, company or corporation, whose franchise shall be so regulated and controlled; and shall in like manner estimate as to each of such persons, companies, associations, and corporations, their annual reasonable expenses, including the cost of repairs, management, and operating such works; and, for the purpose of such ascertainment, may require the attendance of persons to give evidence, and the production of papers, books, and accounts, and may compel the attendance of such persons and the production of papers, books, and accounts, by attachments, if within their respective counties.

SEC. 5. In the regulation and control of such water rates for each of such persons, companies, associations, and corporations, such Board of Supervisors may establish different rates at which water may and shall be sold, rented, or distributed, as the case may be; and may also establish different rates and compensation for such water so to be furnished for the several different uses, such as mining, irrigating, mechanical, manufacturing, and domestic, for which such water shall be supplied to such inhabitants, but such rates as to each class shall be equal and uniform. Said Boards of Supervisors, in fixing such rates, shall, as near as may be, so adjust them that the net annual receipts and profits thereof to the said persons, companies, associations, and corporations so furnishing such water to such inhabitants shall be not less than six or more than eighteen per cent upon the said value of the canals, ditches, flumes, chutes, and all other property actually used and useful to the appropriation and furnishing of such water of each of such persons, companies, associations, and corporations; but in estimating such net receipts and profits, the cost of any extensions, enlargements, or other permanent improvements of such water rights or waterworks shall not be included as part of the said expenses of management, repairs and operating of such works, but when accomplished, may and shall be included in the present cost and cash value of such work. In fixing said rates, within the limits aforesaid, at which water shall be so furnished as to each of such persons, companies, associations, and corporations, each of said Board of Supervisors may likewise take into estimation any and all other facts, circumstances, and conditions pertinent thereto, to the end and purpose that said rates shall be equal, reasonable, and just, both to such persons, companies, associations, and corporations, and to said inhabitants. The said rates, when so fixed by such Board, shall be binding and conclusive for not less than one year next after their establishment, and until es-

tablished anew or abrogated by such Board of Supervisors, as hereinafter provided. And until such rates shall be so established, or after they shall have been abrogated by such Board of Supervisors, as in this Act provided, the actual rates established and collected by each of the persons, companies, associations, and corporations now furnishing, or that shall hereafter furnish, appropriated waters for sale, rental, or distribution to the inhabitants of any of the counties of this State, shall be deemed and accepted as the legally established rates thereof.

Sec. 6. At any time after the establishment of such water rates by any Board of Supervisors of this State the same may be established anew, or abrogated in whole or in part by such Board, to take effect not less than one year next after such first establishment, but subject to said limitation of one year, to take effect immediately in the following manner: Upon the written petition of inhabitants as hereinbefore provided, or upon the written petition of any of the persons, companies, associations, or corporations, the rates and compensations of whose appropriated waters have already been fixed and regulated, and are still subject to such regulation by any Board of Supervisors of this State, as in this Act provided; and upon the like publication or posting of such petition and notice, and for the like period of time as hereinbefore provided, such Board of Supervisors shall proceed anew, in the manner hereinbefore provided, to fix and establish the water rates for such person, company, association, or corporation, or any number of them, in the same manner as if such rates had not been previously established, and may, upon the petition of such inhabitants, but not otherwise, abrogate any and all existing rates theretofore established by such Board. All water rates, when fixed and established as herein provided, shall be in force and effect until established anew or abrogated as provided in this Act.

SEC. 7. Each Board of Supervisors of this State,

when fixing and establishing, or fixing and establishing anew, or abolishing any previously established water rates, as hereinbefore provided, shall cause a record to be made thereof in the records of such Board, and cause the same to be published or posted in the manner and for the time required for the publication or posting of said petitions and notices.

SEC. 8. Any and all persons, companies, associations, or corporations, furnishing for sale, rental, or distribution, any appropriated waters to the inhabitants of any county or counties of this State (other than to the inhabitants of any city, city and county, or town, therein), shall so sell, rent, or distribute such waters at rates not exceeding the established rates fixed and regulated therefor by the Boards of Supervisors of such counties, or as fixed and established by such person, company, association, or corporation, as provided in this act.

SEC. 9. If any person, company, association, or corporation, whose water rates for any county of this State have been fixed and regulated by a Board of Supervisors, as in this Act provided, and while such rates are in force, shall collect for any appropriated water furnished to any inhabitant of such county water rates in excess of such established rates, shall be liable, in an action by any such inhabitant so aggrieved, to a recovery of the whole rate so collected, together with actual damages sustained by such inhabitant, with costs of suit.

SEC. 10. Every person, company, association, and corporation, having in any county in the State (other than in any city, city and county, or town, therein), appropriated waters for sale, rental, or distribution, to the inhabitants of such county, upon demand therefor, and tender in money, of such established water rates, shall be obliged to sell, rent, or distribute such water to such inhabitants at the established rates regulated and fixed therefor, as in this Act provided, whether so fixed by the Board of Supervisors or otherwise, to the

extent of the actual supply of such appropriated waters of such person, company, association, or corporation for such purposes. If any person, company, association, or corporation, having water for such use, shall refuse compliance with such demand, or shall neglect, for the period of five days after such demand, to comply therewith to the extent of his or its reasonable ability so to do, shall be liable in damages to the extent of the actual injury sustained by the person or party making such demand and tender, to be recovered, with costs.

SEC. 11. Whenever any person, company, association, or corporation, shall have acquired the right to appropriated water, or shall have acquired the right to appropriate such water in this State, such person, company, association, or corporation, may proceed to condemn the lands and premises necessary to such right of way, under the provisions of title seven, of part third, of the Code of Civil Procedure of this State, and amendments made and to be made thereto, and all the provisions of said Code, so far as the same can be made applicable, relating to the condemnation and taking of property for public uses, shall be applicable to the provisions of this Act.

SEC. 12. This Act shall take effect and be in force from and after its passage.



N<sup>o</sup>. 201.

IN THE  
**Supreme Court of the United States.**

**OCTOBER TERM, 1899.**

N<sup>o</sup>. 201.

H. C. OSBORNE ET AL., APPELLANTS,

VS.

THE SAN DIEGO LAND AND TOWN COMPANY OF  
MAINE, APPELLEE.

**STIPULATION.**

It is hereby stipulated that the opinion of the court below may be printed from the Federal Reporter, volume 76, pages 319 *et seq.*, as being a true copy of the original filed, and that the certificate of the clerk of the circuit court to a copy of said opinion is waived.

A. HAINES,

*Of Counsel for Appellants.*

JOHN D. WORKS,

*Of Counsel for Appellee.*

[Endorsed:] Case No., 17,286. Supreme Court U. S., October term, 1899. Term No., 201. H. C. Osborne *et al.*, appellants, *vs.* The San Diego Land & Town Co. of Maine. Stipulation that the opinion of the court below be printed from Federal Reporter, &c. Filed M'ch 20, 1900.

CHARLES D. LANNING, *Receiver of San Diego Land and Town Company of Kansas, Complainant,*

vs.

H. C. OSBORNE ET AL., *Defendants.*

**Opinion of the Circuit Court Delivered on Ruling upon Complainant's Exceptions to Original Answer in the Original Cause, Filed September 14, 1896.**

Ross, *Circuit Judge*:

The bill in this case alleges, among other things, that the San Diego Land and Town Company, of which the complainant is the duly appointed and qualified receiver, is a corporation duly organized and existing under and by virtue of the laws of the State of Kansas, and at the times mentioned in the bill was doing business in the State of California; that during all the times mentioned the company was and still is the owner of valuable water, water rights, reservoirs, and of a pipe system for furnishing water to consumers for domestic, irrigation, and other purposes, and of a franchise for the impounding, sale, distribution, and disposition of such waters to the defendants and other consumers, and to the city of National City, in this State, and its inhabitants; that its main reservoir and supply of water is and was at the time mentioned situate in a small stream called the Sweetwater river, in San Diego county, distant about five miles from National City, and that its system of reservoirs, mains, flumes, aqueducts, and pipes covers and can supply a limited amount of territory, consisting of certain farming lands within and outside of National City and in part of the residence portion of that city; that the company, in procuring the water and water rights, reservoirs, and distributing system owned by it and in preparing itself to supply consumers with water, expended up to January 1,

1896, \$1,022,473.54, which was reasonably necessary for those purposes; that by the expenditure of that sum of money the company procured and owns, subject to public use and the regulation thereof by law, the property mentioned; that the capacity of its reservoir is six thousand millions of gallons of water; that the defendants are the owners respectively of tracts of land under the company's water system, most of the defendants owning and holding small tracts of only a few acres each; that each of the defendants has, by purchase or otherwise, become the owner of a right to a part of the water appropriated and stored by the company necessary to irrigate his tract of land, and is liable to pay for the use thereof such rental as the company is entitled to charge and collect; that the annual expense of operating and keeping in repair the reservoir and water system of the company and of furnishing the consumers with water is, including interest on its bonds and excluding the natural and necessary depreciation of its system, \$33,034.99; that in order to pay the company the amount of its annual expenses and an income of 6 per cent. on the amount actually invested in its water, water rights, and water system up to the first day of January, 1896, it is necessary that rates for the water sold and consumed be so fixed as to realize to the company the sum of \$119,791.66; that the total amount that was realized by the company from sales of water and water rights and from all other sources on account of its business of supplying water to consumers outside of the city of National City for the year ending January 1, 1896, was about \$13,000, and that no more than that sum can probably be realized for the year ending January 1, 1897, at the rates now prevailing; that all of the mains and pipes of the company and other parts of its property used in furnishing water to consumers are perishable property and require to be replaced at least once in sixteen years and require frequent repairs; that in order to acquire the water and

water rights and to construct its system of water works the company was compelled to and did borrow \$300,000, and that it is compelled to pay as interest thereon \$21,000 annually, which sum must be realized from the sale of its water and is a part of its operating expenses; that the proportionate share of the revenues of the company that should be raised by water rates within the limits of National City, as compared with the revenues that should be raised and paid as rates by consumers outside of that city, is about one-third; that the amount that can be realized from that city and its inhabitants per annum from the rates now prevailing under the ordinance established by that municipality is about \$10,715 and no more; that the value of the water, water rights, reservoirs, franchises, and property necessary for the proper operation of the business of the company and now held by it is \$1,100,000, and that the same is necessary for the use of the company in furnishing water to the defendants and other consumers; that the city of National City is a municipal corporation of the sixth class, organized under the general laws of the State of California, and that the rates to be charged for water within the city are fixed by its board of trustees, as provided by law; that the company commenced to furnish water to consumers in the year 1887; that it was then informed by its engineer that its system and the supply of water that could be stored thereby would furnish water to consumers sufficient to irrigate 20,000 acres of land, and would supply such water in addition thereto as would be necessary for domestic use inside and outside of the city of National City; that the company was then unfamiliar with the operation of a plant and system of the kind constructed by it, and did not know what the cost of operating and maintaining the same would be; that relying upon the report and estimate of its engineer, and believing that, by fixing and charging an annual rate of \$3.50 per acre for irrigation, it could meet its operating expenses and pay it some

interest on its investment, it fixed and established and has since charged the rate of \$3.50 per annum and no more until January 1, 1896; that instead of being able to supply from its system water sufficient to irrigate 20,000 acres, it has been demonstrated by actual experience that the system will not supply water sufficient to irrigate to exceed 7,000 acres, together with the water demanded for domestic use, and probably not to exceed 6,000 acres, although there are about 10,000 acres under the system susceptible of irrigation; that at the rate of \$3.50 per acre, if water should be demanded and used upon the whole of the lands which the system is able to supply with water, and rates are allowed in National City equally high for domestic use and irrigation, the company would not be able to pay its operating expenses and maintain its plant and system, and that the company has been and still is, under the rates mentioned, losing money every year, and its plant and system has been and is gradually going to decay from natural depreciation consequent upon its use in supplying consumers with water without any revenue or means being provided for replacing the same, whereby the system and the money invested by the company therein will be wholly lost to it, and it will, if the rate of \$3.50 per acre be maintained, be compelled to furnish water to consumers at an actual and continual loss; that in order to pay the cost of operating the plant and maintaining the same and pay the company a reasonable interest on its investment or a reasonable sum for its services in supplying water to the defendants and other consumers, it will be necessary for it to charge a rate per acre per annum of not less than \$7 for irrigation purposes, which sum is a reasonable rate for consumers to pay, and the smallest amount for which the company can furnish the water without loss to it; that by the laws of the State of California the board of supervisors may, upon the petition of twenty-five inhabitants who are tax-payers of the county, fix the rate of

yearly rental to be collected by the company, but no such petition has ever been presented or rates fixed in the case of the company; that for the reasons stated the company gave notice to the defendants that on January 1, 1896, it would establish a rental of \$7 per acre per annum for water supplied to their and each of their lands for irrigation, and that from and after that date they and each of them would be required to pay that sum for the irrigation of their and each of their lands, and that the receiver, after his appointment and before the date mentioned, gave a similar notice; that the defendants and each of them refused to pay the rate of \$7 per acre, and maintained that neither the company nor the receiver has any legal right to increase the amount of rental to be paid by them or any of them, and that the rate of \$3.50 established and collected by the company must be and remain the established rate of rental until a rate is established by the board of supervisors of the county in which the plant is situated; that an increase of the rate is absolutely necessary to enable the receiver to maintain and operate the plant and pay the expenses of its maintenance and operation as he is required by law to do; that, in order to enforce the payment of the rate so fixed, the receiver caused the water to be shut off from the premises of the defendants and each of them until such rates are paid, and that the defendants threatened to and will, unless restrained from so doing by this court, commence suits in the superior court of the county of San Diego, State of California, to compel the receiver to turn on and furnish water to their lands without the payment of \$7 per acre rental, on the ground that they are entitled to the use of the water for \$3.50 per acre, and for damages for cutting off the said supply of water; that the rights of the defendants are the same and the determination of the question of the right of the company and of the receiver to increase the rate of rental to be charged and collected affects all of the defendants in the same way

and to the same extent, except that the quantity of land owned by the several defendants is different; that the bringing of such suits by the defendants separately will involve the company, the receiver, and the defendants in a multiplicity of suits, and put them and each of them to great and unnecessary cost and expense and seriously hinder the receiver in the proper operation and management of the property of the company and the settlement of its outstanding debts, liabilities, and obligations, while all of the questions involved in such litigation and the rights of all the parties in interest can be better settled and determined in one suit, and vexatious litigation and unnecessary expense and consequent unnecessary interference with the receiver's management and control of the property and business of the company be thereby avoided; that the proposed increase in rates will add to the revenue and earnings of the company from the sale and distribution of the water from its system with the amount of land now under irrigation not less than \$14,000 per annum, and upon the whole of the lands that can be irrigated under the system of the company of not less than \$21,000 per annum.

The prayer of the bill is that the defendants and each of them be enjoined from prosecuting in the State courts or elsewhere separate actions against the receiver or the company growing out of the matters alleged; that the defendants and each of them be required to appear in this suit and set up any claims they may have against the right of the receiver or the company to increase the rate for water so furnished, and that it be finally decreed by the court that the receiver and the company have the right to increase the rate to any reasonable sum, and that the sum of \$7 per acre per annum is a reasonable rental to be charged for irrigation, and that the defendants and each of them be required to pay that rate as a condition upon which water shall be furnished them, and for such other and further relief as the nature of the case may demand.

The answer of the defendants, to which exceptions are taken, alleges, among other things, that the purposes for which the San Diego Land and Town Company was incorporated are "the encouragement of agriculture and horticulture, the maintenance of public works, the maintenance of a public and private cemetery; the purchase, location and laying out of town sites, and the sale and conveyance of the same in lots and subdivisions or otherwise; the supply of water to the public; the erection of buildings and the accommodations and loan of funds for the purchase of real property; the establishment and maintenance of a hotel; the promotion of immigration; the construction and maintenance of sewers; the erection and maintenance of market-houses and market places; the construction and maintenance of dams and canals for the purpose of water works, irrigation, or manufacturing purposes; the conversion and disposal of agricultural products by means of mills, elevators, markets and stores or otherwise; the accumulation and loan of funds; the erection of buildings and the purchase and sale of real estate for the benefit of its members. And the construction and maintenance of such other improvements as may be necessary or desirable for the proper exercise of any or all such corporate purposes." The answer admits the appropriation of the waters in question by the company for the purposes stated in the bill, and alleges that the company acquired a portion of its reservoir site by condemnation proceedings under the laws of the State of California, and that it has exercised and does exercise its franchise to furnish the water by virtue of the comity of the State of California and subject to the conditions prescribed by the constitution and laws of that State. The answer avers that the quantity of farming and orchard lands within and without National City lying under the flowage of the company's reservoir and within the reach of its supply of water is about 12,000 acres; that the capacity of the reservoir is sufficient to supply water needed for the irrigation of 9,000 acres of



land, and also for the domestic and other uses and needs of a population when settled thereon and in National City of at least 20,000 persons; that of the 12,000 acres of farming and orchard lands lying under the company's system, the company, in January, 1887, owned and held for the purpose of sale, use, and profit about 7,000 acres; that the portion of the territory of National City that it in January, 1887, laid out into town lots, comprised 6,691 lots, of which the company then owned 2,849; that the lands of the company owned by it in January, 1887, irrigable from its reservoir and distributing system are situate in the Sweetwater valley, in Chula Vista and in National City, and within the boundaries of National ranch, in the county of San Diego, and also in Otay valley, in the same county, adjoining National ranch on the south, and in the territory known as "Ex-Mission lands," adjacent to National City on the north, and that the lands described, together with the lots owned by the company, form virtually one continuous tract extending from near the base of the Sweetwater reservoir westward to the bay of San Diego and from the Otay valley on the south to the boundaries of the city of San Diego on the north and west; that the lands and lots as owned in January, 1887, by others than the company are in detached parcels, scattered among the lots and lands of the company; that the lands of the company were in January, 1887, entirely unsettled and in their natural state, and were almost entirely arid and of but little value without water for irrigation; that the city lots owned by the company were at the same time vacant and unimproved and of little value, except in anticipation of settlement of the lands under the water system and of the anticipated growth of the population of National City; that the lands and lots belonging to the defendants and others than the company were also at that date largely unsettled and in their natural state, and were of the same general character as those of the company; that the company, being desirous of selling its lands

and lots and of taking advantage of the speculative conditions then prevailing in southern California, made the appropriation of the waters of the Sweetwater river and planned and executed the construction of the reservoir and water system primarily to serve and settle its own lands and lots and the inhabitants, who by promise of such water should be induced to purchase the same, and that the company's water system was constructed to serve incidentally only the lands of others than the company; that in part execution of its project, the company laid out and platted its tract known as Chula Vista, consisting of about 5,000 acres, in blocks of forty acres each, and subdivided the blocks into lots of five acres each, and laid pipes therein so as to reach and serve each five-acre lot; that in further execution of its project, the company laid pipes in the streets of National City, so as to reach its vacant city lots, as well as any inhabited lot along its lines of pipes, and also so as to reach its farming lands within the city, and extended its pipes through the city to serve and irrigate 390 acres of the Ex-Mission lands, and also laid pipes in the Sweetwater and Otay valleys and elsewhere in National ranch, to reach and serve its lands there situated; that nine-tenths of the company's distributing pipe system, when laid and ready for operation in February, 1888, was so laid in anticipation of future use and payment for the water, and not for any use or demand then existing, and that when laid it was and to a great extent still is ahead of the demands therefor, and that much thereof has laid unused.

The answer further alleges that from the inception of its enterprise until January 1, 1896, the company held its farming and orchard lands and its lots in National City for sale, and as an inducement to their purchase, both privately and publicly and continuously, represented that the water of its system was piped to and over its lands and lots and was and would be supplied to purchasers thereof for irrigation at the rate of \$3.50 per acre per annum for farming and

orchard lands and for city lots in ample quantity and at cheap rates; that the lands of the company in the Sweetwater and Otay valleys and in the Ex-Mission without water have at no time been worth more than an average of \$35 per acre, and in Chula Vista no more than from \$75 to \$100 per acre; that with the appurtenant water supply the company has at all times since early in the year 1887 held its raw lands in the Sweetwater and Otay valleys and in the Ex-Mission at an average price of \$250 per acre, and in Chula Vista at prices ranging from \$300 to \$500 per acre, except that it offered and sold about six five-acre tracts of its Chula Vista lands at \$150 per acre as an inducement to the first few purchasers to locate thereon, and has at all times held its land other than town lots within the city of National City, together with the annexed water supply, at from \$350 to \$500 per acre.

The answer alleges that prior to the bringing of this suit the company, upon the representation that the annual rate of water for irrigation was and shall be \$3.50 per acre, sold to certain of the defendants and their predecessors in interest certain of its lands, aggregating 714 acres, at the enhanced prices mentioned, with the easement of water annexed as an incident and appurtenant thereto, and that each purchaser thereof respectively relied upon the representations of the company that the annual rate for water to be supplied for irrigation was and would remain not higher than \$3.50 per acre, and that in each of those cases the company, prior to making its conveyance, connected the land so sold with the actual flow of water of its system, both for irrigation and domestic and other uses; and in respect of lands so sold by the company in Chula Vista, it exacted from and imposed upon each of the purchasers his obligation to erect a residence thereon at once, to cost not less than \$2,000.

The answer further alleges that up to December, 1892, the company made no express or separate grant of "water

rights" as appurtenant to the lands so sold by it, but granted the easement of the flow and use of the water from its system as appurtenant to the land sold, "and contracted for and received compensation for the land and appurtenant water right in a single price for both;" that after December, 1892, the company in all cases of sales of its lands by an express contract in writing specifically sold to those defendants who purchased lands from it that purtenant water right, and that each of such contracts contained the following provisions (the description of the land and the price for the same with the water being adapted to each case respectively), to wit: "That in consideration of the stipulation herein contained, and the payments to be made, as hereinafter specified, the party of the first part (the company) hereby agrees to sell unto the party of the second part; and the party of the second part agrees to purchase of the party of the first part the following real estate, to wit (description), together with a water right to the one-acre foot of water per annum for each and every acre of said above-described real estate, to be delivered by the party of the first part through its pipes and flumes at a point —; said water to be used exclusively on said real estate, and to become and be appurtenant thereto and not to be diverted therefrom; provided that the party of the first part may change the place of delivery of said water, so long as the same is near the highest point of said land. For which land and water right the party of the second part agrees to pay the sum of — dollars; and the party of the second part further agrees and binds —self, — heirs, executors, and assigns to pay the regular annual water rates allowed by law and charged by the party of the first part for the water covered by said water rights, whether said water is used or not, and to pay for all water used on said land for domestic purposes monthly, under such rules and regulations for the delivery of water to consumers as the party of the first part may from time to time make"

The answer further alleges that the title to about 970 acres

in the aggregate of lands lying outside of National City and acquired by certain defendants was not derived from the company, in respect to which the company furnished water up to December, 1892, without exacting a price for a water right, but voluntarily annexed the perpetual easement of the flow and use of water from its system to such lands and voluntarily treated those tracts as it did all tracts sold by it to other defendants, and that from the beginning of its service of water the only water rates actually established and collected by the company for water furnished by it to land not sold by it have been the same as for water supplied to lands it sold.

The answer further alleges that from and after December, 1892, the company refused to furnish water to irrigate other or further lands under its system not owned or sold by it except upon the payment of a sum in gross for the water right, over and above the uniform annual rate as actually established and collected from all of the lands under the system; that it first fixed the price of such water rights at \$50 per acre, and later raised the same to \$100 per acre, and that from December, 1892, it furnished no water to irrigate any of the lands not sold by it, except upon payment of the price fixed by it for a water right under a contract for the sale of such water right containing the following provisions (the filling of the blanks being adapted to each case), to wit: "That the party of the first part (the company) agrees to and does hereby sell to the party of the second part a water right to one-acre foot of water per acre per annum for each and every acre of the real estate hereinafter described, to be delivered through the pipes and flumes of the party of the first part — for the sum of — dollars, payable as follows: —; provided the party of the first part may, at its option, change the place of delivery of said water, so long as the same is near the highest point on the lands for which the water is delivered under and in accordance with the rules and regulations established from time to time by the party of the

first part. Said water right is sold for the use of and to be appurtenant to the following-described real estate now owned by the party of the second part in the county of San Diego, State of California, to wit, —, consisting of — acres; and it is expressly understood and agreed that the water right hereby sold shall belong to said described real estate and be used thereon and not diverted therefrom or used on any other lands. In consideration of the foregoing stipulations and agreements the party of the second part agrees and binds —self, — heirs, executors, and assigns to pay the sums above specified promptly as the same and each of them falls due, and that — will in all things comply with and perform the terms and conditions of this agreement on — part to be performed, and that — and they will promptly pay all annual water rates and charges for the water to which — is entitled under and by virtue of this agreement, at rates fixed by the party of the first part as allowed by law and at the times, in the manner and according to the rules and regulations made and adopted by the party of the first part; the annual rental for the amount of water to which the party of the second part is entitled under this contract to be paid whether the same is used or not, and also to pay for all water used by — on said land for domestic purposes at the rates fixed by the party of the first part and allowed by law.”

The answer alleges that under such contracts as that last quoted the company conveyed appurtenant water rights to about 200 acres of the lands to certain of the defendants.

The answer further alleges that the defendant J. M. Ballou owns a water right by virtue of a special written contract with the company, making such water right appurtenant to his land, and for a valuable consideration by him paid to said company and under the following provisions: “Provided, that said party of the second part shall make application in the form provided by the company for the use of the water and use the same under the same restric-

tions and conditions, and to pay said party of the second part the current rate therefor as established for Chula Vista ; provided, said restrictions and conditions are not inconsistent with the water right hereby granted to said party of the second part."

The answer further alleges that certain of the defendants who are owners in the aggregate of 400 acres of what is known as the Ex-Mission lands have annexed to them water rights by virtue of a written contract with the company which reads as follows: "The parties of the first part will make application for the use of the water upon the form provided by the party of the second part for that purpose, and pay for the use of the water at the current rates as may be enforced from time to time for supplying lands in National ranch and subject to the same general rules and regulations."

The answer further alleges that on or about June 3, 1895, the company established a classification of lands which had been or should be provided with water by its system, to take effect July 1, 1895, and afterward confirmed the same to take effect January 1, 1896, and that such classification has been adopted by the receiver and is in words following, to wit: "Tenth. For the purpose of fixing rates for irrigating acre property, the lands of that character are classified as follows: All lands to which the easement and flow of water for irrigation has been or shall be annexed by the consent or voluntary act of this company shall constitute the first class. All lands to which the easement and flow of water for irrigation has not been or shall not be annexed by the consent or voluntary act of this company shall constitute the second class."

And that in respect of such second class of lands, the company at the same time promulgated the following, to wit: "In addition to said annual rate for water used upon lands of said second class, there shall be paid upon the lands of said class an annual charge equal to 6 per centum

of the value of the right to said easement and flow of water for irrigation, which said value shall be taken as one hundred (\$100) dollars per acre."

The answer alleges that the lands of each and all of the defendants fall within the first class so defined by the company and the receiver.

The answer avers that neither of the defendants is in any event liable for more than his respective due proportion of the annual expense of the repair, maintenance and operation of the company's water system: that such of their number as have purchased lands with water rights appurtenant thereto from the company and such of their number as have purchased water rights made appurtenant to their lands not bought of the company have each and all paid the full amount demanded by the company as the price of the perpetual easement of the water supplied thereto by the company, and avers that such easements are, respectively, servitudes upon the company's water system, and have been fully paid for, and that the owners of such lands are forever discharged and acquitted from payment of any further sum or sums to apply on the principal of or as income upon the cost or value of the water company's system or any debt incurred by the company for construction thereof. And the defendants "allege that said company, in each of said cases, received satisfaction for, from, and parted with to, each such defendant or to his and her predecessor in interest so much of its franchise to demand and collect water rentals proportioned to said lands as corresponded or related to interest or income on the cost or value of said system or to net annual receipts and profits thereof or therefrom; and that it retained and now holds only so much of its said franchise proportioned to said lands as relates to the due proportion of the annual reasonable expenses of the repair, management, and operation of such system; and that in said respects it has at all times put all other lands to which it has voluntarily annexed said water



rights upon the same footing, and that all such lands have remained on the same footing for more than five years; that said lands have in many cases changed owners while so supplied with water at the same rates and on the same footing as to water rights with the land sold by the said company with annexed water rights as aforesaid; that the value of said water rights has for more than five years entered into the market value of said lands, and has in all cases been paid for to their vendors by the present owners, these defendants, who are successors in title by mesne or immediate conveyance of the lands to which, during the former ownership, the company voluntarily annexed said perpetual easement and water rights, and that neither any such lands nor the owners of any thereof are in any event liable for any other or further water rentals than are the lands, the ownership of which with said water rights were derived from said corporation."

Copious extracts have thus been taken from the answer to show the grounds upon which it is strenuously contended the water in question must be continued to be furnished to the defendants for irrigation at the annual rate of \$3.50 per acre.

At the time of the adoption and taking effect of the constitution of California of 1879, the provisions of section 552 of the Civil Code of that State were, and yet are, as follows:

"Whenever any corporation, organized under the laws of this State, furnishes water to irrigate lands which said corporation has sold, the right to the flow and use of said water is and shall remain a perpetual easement to the land so sold, at such rates and terms as may be established by said corporation in pursuance of law. And whenever any person who is cultivating land on the line and within the flow of any ditch owned by such corporation, has been furnished water by it with which to irrigate his land, such person shall be entitled to the continued use of said water,

upon the same terms as those who have purchased their land of the corporation."

Sections 1 and 2 of article XIV of the constitution of 1879 are as follows:

"SECTION 1. The use of all water now appropriated, or that may hereafter be appropriated, for sale, rental, or distribution, is hereby declared to be a public use, and subject to the regulation and control of the State, in the manner to be prescribed by law: *Provided*, That the rates of recompensation to be collected by any person, company or corporation in this State for the use of water supplied to any city and county, or city or town, or the inhabitants thereof, shall be fixed, annually, by the board of supervisors, or city or county, or city or town council, or other governing body of such city and county, or city or town, by ordinance or otherwise, in the manner that other ordinances or legislative acts or resolutions are passed by such body, and shall continue in force for one year, and no longer. Such ordinances or resolutions shall be passed in the month of February of each year, and take effect on the 1st day of July thereafter. Any board or body failing to pass the necessary ordinances or resolutions fixing water rates, where necessary, within such time, shall be subject to peremptory process to compel action at the suit of any party interested, and shall be liable to such further processes and penalties as the legislature may prescribe. Any person, company, or corporation collecting water rates in any city and county, or city or town in this State, otherwise than as so established, shall forfeit the franchises and water works of such person, company, or corporation to the city and county, or city or town where the same are collected, for the public use.

"SEC. 2. The right to collect rates of compensation for the use of water supplied to any county, city and county, or town, or the inhabitants thereof, is a franchise, and cannot

be exercised except by authority of and in the manner prescribed by law."

The late case of *San Diego Land and Town Company vs. City of National City*, decided by this court and reported in 74 Fed. Rep., p. 79, presented the question, among others, whether that company had the legal right to demand and receive a sum of money in addition to the annual rates it was authorized to charge as a condition upon which it would furnish water appropriated by it under the constitution and laws of California to the persons for whose use the appropriation was made. The thing for which that company demanded a sum of money in addition to the annual rates it was by law authorized to charge it designated as a "water right." In that case this court said: "It does not change the essence of the thing for which the complainant demands a sum of money to call it a 'water right,' or to say, as it does, that the charge is imposed for the purpose of reimbursing complainant in part for the outlay to which it has been subjected. It is demanding a sum of money for doing what the constitution and laws of California authorized it to appropriate water within its limits, conferred upon it the great power of eminent domain, and the franchise to distribute and sell the water so appropriated, not only to those needing it for purposes of irrigation, but also to the cities and towns, and their inhabitants, within its flow; for which it was given the right to charge rates to be established by law, and nothing else. No authority can anywhere be found for any charge for the so called 'water right.' The State permitted the water in question to be appropriated for distribution and sale, for purposes of irrigation, and for domestic and other beneficial uses; conferring upon the appropriator the great powers mentioned and compensating it for its outlay by the fixed annual rates. The complainant was not obliged to avail itself of the offer of the State, but choosing, as it did, to accept the benefits conferred by the constitution and laws of California, it ac-

cepted them charged with the corresponding burden. Appropriating, as it did, the water in question for distribution and sale, it thereupon became, according to the express declaration of the constitution, charged with a public use. 'Whenever,' said the supreme court of California, in *McCrary vs. Beaudry* (67 Cal., 120, 121; 7 Pac., 264), 'water is appropriated for distribution and sale, the public has a right to use it; that is, each member of the community, by paying the rate fixed for supplying it, has a right to use a reasonable quantity of it in a reasonable manner. Water appropriated for distribution and sale is *ipso facto* devoted to a public use, which is inconsistent with the right of the person so appropriating it to exercise the same control over it that he might have exercised if he had never so appropriated it.' "

In the present suit this ruling of this court is assailed, and it is said for the company that it is opposed to the ruling of the supreme court of California in the cases of *Fresno Canal Company vs. Rowell* (80 Cal., 114), and *Fresno Canal Company vs. Dunbar* (80 Cal., 530); that in those two cases the supreme court of California expressly recognize the existence of such a right and enforced it in behalf of such water companies.

An examination of those cases clearly shows that counsel is altogether mistaken in his statement; no such question was there raised, considered, or decided. In neither of those cases did it anywhere appear that the water, a part of which the Fresno Canal Company undertook to sell, in the one case, and to furnish in the other, was appropriated by the company under or by virtue of the constitution and laws of California, nor was it suggested in either case that the water had otherwise become subject to the public use declared by the constitution and laws of California, and for that reason that only legally established rates could be charged for its use. But a similar question did arise in the supreme court of Colorado in the case of *Wheeler vs. North-*

ern Colorado Irrigating Company (17 Pac. Rep., 487), and was there decided in precise accord with the ruling of this court in San Diego Land and Town Company *vs.* The City of National City (*supra*). The provisions of the constitution of Colorado were, at the time the case cited arose, as follows :

"SEC. 5. The water of every natural stream not heretofore appropriated within the State of Colorado is hereby declared to be the property of the public, and the same is dedicated to the use of the people of the State, subject to appropriation as hereinafter provided.

"SEC. 6. The right to divert unappropriated waters of any natural stream to beneficial uses shall never be denied. Priority of appropriation shall give the better right as between those using the water for the same purpose ; but when the waters of any natural stream are not sufficient for the service of all those desiring the use of the same, those using the water for domestic purposes shall have the preference over those claiming for any other purpose, and those using the water for agricultural purposes shall have preference over those using the same for manufacturing purposes.

"SEC. 7. All persons and corporations shall have the right of way across public, private and corporate lands for the construction of ditches, canals and flumes for the purpose of conveying water for domestic purposes, for irrigation of agricultural lands, and for mining and manufacturing purposes, and for drainage, upon payment of just compensation.

"SEC. 8. The General Assembly shall provide by law that the board of county commissioners in their respective counties shall have power, when application is made to them by either party interested, to establish reasonable maximum rates to be charged for the use of water, whether furnished by individuals or corporations."

In the Colorado case the pleadings showed the water com-

pany to be a carrier and distributor of water for irrigation and other purposes, with a canal upward of sixty miles in length, and capable of supplying water to irrigate a large area of land. It had undisposed of a sufficient quantity of water to supply the wants of the relator, who was one of the land-owners and consumers under the canal, and who could obtain water from no other source. He tendered the amount of the annual rental fixed by the company, and demanded the use of water for the current season, but the company demanded as a condition precedent to the granting of his request that he buy in advance "the right to receive and use water" from its canal, and pay therefor \$10 per acre, just as the San Diego Land and Town Company, in the case decided by this court, demanded \$50 per acre at one time and \$100 per acre afterward for a similar so-called "water right." The supreme court of Colorado held, as did this court in the case referred to, the demand, in addition to the annual rates for the so-called water right, illegal and void. In the course of his opinion the justice, delivering the opinion of the court, said: "Our constitution dedicates all unappropriated water in the natural streams of the State 'to the use of the people,' the ownership thereof being vested in 'the public.' The same instrument guarantees in the strongest terms the rights of diversion and appropriation for beneficial uses. With certain qualifications it recognizes and protects a prior right of user, acquired through priority of appropriation. We shall presently see that, after appropriation, the title to this water, save, perhaps, as to the limited quantity that may be actually flowing in the consumer's ditch or lateral, remains in the general public, while the paramount right to its use, unless forfeited, continues in the appropriator; but to constitute a legal appropriation the water diverted must be applied within a reasonable time to some beneficial use—that is to say, the diversion ripens into a valid appropriation only when the water is utilized by the consumer, though

the priority of such appropriation may date, proper diligence having been used, from the commencement of the canal or ditch. The constitution unquestionably contemplates and sanctions the business of transporting water for hire from natural streams to distant consumers. The Colorado doctrines of ownership and appropriation (as declared in the constitution, statutes, and decisions) necessarily give the carrier of water an exceptional status; a status differing in some particulars from that of the ordinary common carrier. Certain peculiar rights are acquired in connection with the water diverted. It is unnecessary now, however, to enumerate these rights in detail. For the present, it suffices to say that they are dependent for their birth and continued existence upon the use made by the consumer. But, giving these rights all due significance, I cannot consent to the proposition that the carrier becomes a "proprietor" of the water diverted. A cursory reading of the statutes might convey the impression that the legislature regarded the carrier as possessing a salable interest in this water; and the constitutional phrase, "to be charged for the use of water," relating to the carrier's compensation, might at first glance seem to recognize a like ownership in such use; but, construing all the provisions of that instrument bearing upon the subject *in pari materia*, the correctness of both of these inferences must be denied. The constitutional convention was legislating with reference to the necessities and practical wants of the people, and this body in its wisdom ordained that the ownership of water should remain in the public, with a perpetual right to its use, free of charge, in the people. By section 8, article XVI, of the constitution, from which the foregoing phrase is taken, the convention recognized the carrier's right to compensation for transporting water, and provided for a judicial or quasi-judicial tribunal to fix an equitable maximum charge where the parties fail to agree. It requires no citation of authority to show that the words "pur-

chase" and "sale," together with other words of like import used in this connection by the legislature, must receive a corresponding interpretation. Under the constitution, as I understand it, the carrier is at least a quasi-public servant or agent. It is not in the attitude of a private individual contracting for the sale or use of his private property. It exists largely for the benefit of others, being engaged in the business of transporting, for hire, water owned by the public to the people owning the right to its use. It is permitted to acquire certain rights as against those subsequently diverting water from the same natural stream. It may exercise the power of eminent domain. Its business is affirmatively sanctioned and its profits or emoluments are fairly guaranteed; but in consideration of this express recognition, together with the privileges and protection thus given, it is, for the public good, charged with certain duties and subjected to a reasonable control. Were the constitution and statutes absolutely silent as to the amount of the charge for transportation and the time and manner of its collection, there would be a strong legal ground for the position that the demand in these respects must be reasonable. The carrier voluntarily engages in the enterprise. It has in most instances, from the nature of things, a monopoly of the business along the line of its canal. Its vocation, together with the use of its property, are closely allied to the public interest. Its conduct in connection therewith materially affects the community at large. It is, I think, charged with what the decisions term "a public duty or trust."

In the subsequent case of *Holmes vs. Agricultural Ditch Co.* (28 Pac. Rep., 966) the supreme court of Colorado held that the constitutional right of individual consumers, upon tender of the regular rates, to water diverted by a carrier cannot be evaded or qualified by a regulation compelling the purchase of stock in the carrier company as a condition precedent to its use, saying: "If ditch companies were at



liberty to divert water without limit and at the same time make the ownership of stock an absolute condition precedent to the right to procure water from their irrigating canals, water rights would soon become a matter of speculation and monopoly, and tillers of the soil would have to pay exorbitant rates for the use of water, or our arid lands would become unproductive. The constitution provides that the water of natural streams may be diverted to beneficial use; but the privilege of diversion is granted only for uses truly beneficial, and not for purposes of speculation. This is evident from the fact that provision is made for establishing reasonable rates to be charged for the use of water by individuals or corporations furnishing the same, the evident purpose of which is that actual and beneficial consumers of water may not be subjected to extortionate demands."

In line with what has been said above are the cases in the supreme court of California of *Price vs. Riverside L. & I. Co.* (56 Cal., 431) and *People vs. Stephens* (62 Cal., 209). In *Price vs. Riverside Co.* it was, among other things, claimed that the company was a purely private corporation, and not obliged to furnish water to the public. The court said: "So far as the appropriation, purchase, or condemnation as to a public use of waters for irrigation purposes, as also their distribution for rates or tolls is concerned, defendant cannot deny that it is a 'canal' company. Each person entitled to water, on the theory that such companies are charged with the duty of disposing of it for proper compensation, is entitled to treat with defendant as if it had been organized exclusively under the act of May 14, 1862, 'An act to authorize the incorporation of canal companies and the construction of canals' (Stats. 1862, p. 540). The rights and privileges which may be claimed and exercised by defendant with respect to water are derived from that act. With reference to such rights and privileges, and their corresponding obligations, the defendant is at least a corpora-

tion *de facto*; it cannot successfully assert the one and disregard the other. Every corporation deriving its being from the act above cited has impressed upon it a public trust—the duty of furnishing water, if water it has, to all those who come within the class or community for whose alleged benefit it has been created. Every such corporation may exercise, on behalf of the public, the power of eminent domain, and no man nor company of men, incorporated or otherwise, can take the property of a citizen for his own or their own exclusive benefit. So plain a proposition cannot require elaboration. The power—in its nature a public power—and the public duty are correlative. The duty exists without any express statutory words imposing it wherever the public use appears. Nor is it necessary, as the case is presented, to deny that a corporation may be formed to furnish with water, for purposes of irrigation, a particular community, or even a particular territory, provided the territory is not in the exclusive occupation of the corporation itself. This defendant was organized ‘to furnish, sell, give, or supply water to any person or corporation, for irrigation, mechanical, or other purposes.’ Even assuming that the duty imposed on defendant by its articles of incorporation and the law under which it was created could be limited by a transfer to it from the Southern California Colony Association of its ‘rights, franchises, and privileges,’ the last-named corporation was organized to furnish, etc., water to people of the town and colony mentioned in the complaint ‘and others’ in the townships specifically set forth, for irrigation and other purposes. The plaintiff’s land is a portion of one of the townships named in the complaint and the articles of incorporation of the Southern California Colony Association. The defendant, therefore, is bound to furnish plaintiff with water to irrigate his lands on his payment of the rates fixed in the manner prescribed by law—it having the water to furnish. The case shows that defendant has an ample

supply of water to furnish the quantity demanded by those entitled to receive it, including the quantity alleged on argument to be needed by plaintiff. The rates which defendant may charge have never been fixed in the manner required by law, but defendant has itself fixed the rates and could not be permitted to refuse water to one otherwise entitled to receive it who should offer to pay those rates."

In *People vs. Stephens*, in speaking of sections 1 and 2 of article XIV of the constitution of California, the court said: "By section 1 of article XIV, the use of all water heretofore or hereafter appropriated for sale, rental, or distribution, is expressly declared to be a public use. It is not left to the legislature, as formerly, to say whether it shall be a public use or not, but the constitution itself declares it to be such, and then makes the use subject to the regulation and control of the State—that is to say, of the legislature—in the manner to be prescribed by law, to wit, by statute law, subject, however, to certain enumerated provisions contained in the constitution itself, among them to provisions in respect to the rates or compensation to be collected by any person, company, or corporation for the use of water supplied to any city and county or city or town, or the inhabitants thereof. Such rates or compensation the constitution expressly declares shall be fixed in a certain specified manner, at a certain time, and by a certain body, and the body failing to do so is expressly made subject to peremptory process to compel action at the suit of any party interested, and liable to such further processes and penalties as the legislature may prescribe; but by the next section of the same article of the constitution the right to collect the rates or compensation so established is declared to be a franchise, 'and cannot be exercised except by authority and in the manner prescribed by law'—that is, by statute law; but of course the constitution contemplated the enacting by the legislature, where they did not exist, of all laws necessary to give effect to its demands, and that none should be passed

in contravention to its provisions. When, therefore, the constitution fixed the manner of establishing the rates or compensation to be charged for water furnished to any city and county or city or town, or the inhabitants thereof, and further declared that the right to collect the rates or compensation so established is a franchise, and cannot be exercised except by authority of and in the manner prescribed by law, it was the duty of the legislature, if they did not exist, to provide the needful laws."

It is impossible to reconcile the declarations of the supreme court of California in either of the two cases last referred to, or in any other case to which my attention has been called, with a right on the part of any corporation appropriating water under and by virtue of the constitution and laws of California for sale, rental, or distribution, to exact any sum of money or other thing, in addition to the legally established rates, as a condition upon which it will furnish to consumers water so appropriated. In the very late case of *Merrill vs. South Side Irrigation Company* (44 Pac. Rep., 720), the supreme court of California held that the provisions of section 1 of article XIV of the constitution of that State applies to all water designed, set apart, and devoted to purpose of sale, rental, or distribution, without reference to the mode of its acquisition; and, accordingly, it held in that case that water acquired by the irrigation company from the city of Los Angeles was subject to the constitutional provisions referred to, and that the company, having supplied it for irrigation to the plaintiff in that case, was by virtue of the second clause of section 552 of the Civil Code of California legally bound to continue such supply at the rates it had established, the company having on hand a sufficient supply for the purpose.

Of course, no company can be compelled to furnish water beyond its capacity. Indeed, consumers themselves are vitally interested in seeing that the capacity of the distributor is not overtaxed; so much so that in Colorado it is held,

and properly held, that a consumer who settles upon and improves land by means of water appropriated and distributed under and by virtue of the constitution and laws of that State, giving to the first in time the first in right, can maintain a suit against the distributor of such water to prevent the spreading of it beyond the capacity of the system so as to endanger the supply of those whose rights have already vested and upon the faith of which they have invested their money and made their improvements (*Wyatt vs. L. & W. Irrigation Co.*, 33 Pac. Rep., 144).

In California the same right is secured to the consumer by statute as well as by judicial decision. It has already been seen from the reference made to the case of *Price vs. Riverside L. & I. Co.* (56 Cal., 431), and *Merrill vs. South Side Irrigation Company* (44 Pac. Rep., 720), that the right of the consumer to demand of the corporation a supply of water presupposes a sufficient supply for the purpose under the control of the company; and by the provisions of section 552 of the Civil Code of California a consumer whose rights have once vested is protected from the injury of having his supply of water cut off, for it in terms declares him entitled to the continued use of the water upon the payment of the rates established as required by law. Necessarily growing out of this right to the continued use of the water which he has acquired as a perpetual easement to his land is the right of such consumer to prevent, by injunction, if need be, the distributor from disposing of or attempting to furnish others beyond the capacity of the system, thereby imperiling the rights of those already vested. So long, however, as a sufficient supply exists, every person within the flow of the system has the legal right to the use of a reasonable amount of water in a reasonable manner upon paying the rate fixed for supplying it. In California, as has been seen, the constitution itself provides that the rates or compensation to be collected by any person, company, or corporation for the use of water supplied to any city, town, or

other municipality shall be fixed in the month of February of each year by the governing body of such a city, town, or other municipality, "by ordinance or otherwise, in the manner that other ordinances or legislative acts or resolutions are passed by such body, and shall continue in force for one year and no longer."

The rates to be charged for water appropriated under and by virtue of the constitution and laws of the State to persons outside of cities, towns, and other municipalities were by the constitution left to be provided for by the legislature, and this the legislature of California did by an act approved March 12, 1885 (Stats. 1885, p. 95), entitled "An act to regulate and control the sale, rental, and distribution of appropriated water in the State other than in any city, city and county, or town therein, and to secure the rights of way for the conveyance of such water to the places of use."

By the terms of this act of the legislature the boards of supervisors of the several counties are given power and it is made their duty, in the manner prescribed in the act, to fix the maximum rates at which any person, company, or corporation may sell, rent, or distribute water appropriated for the purpose. The circumstances and conditions under which such board is authorized and required to do that thing are prescribed by sections 3, 4, 5, and 6 of the act. The action of the board can only be invoked in the first instance by a petition in writing of not less than twenty-five of the inhabitants who are tax-payers of the county. It may be that the number thus fixed by the statute is too large; that in some cases it may be difficult, in others impossible, to obtain twenty-five inhabitants who are tax-payers of the county to join in the petition asking the board to establish maximum rates. If so, it is a matter for the consideration of the legislature, with which the constitution has left it. By the statute as enacted, when such a petition, so signed, has been presented the board, upon giving the notice required, is empowered to examine witnesses, to send for

persons, books, and accounts, to ascertain the value of the water system and the reasonable expenses of its management and operation, including the cost of repairs, together with all other facts, circumstances, and conditions pertinent to the question, and after such investigation and consideration to fix and establish the maximum rates at which the water shall be sold, rented, or distributed to the inhabitants of the county outside of any city, town, or other municipality, the board being empowered to establish different rates for water furnished for the different uses, such as mining, irrigation, mechanical, manufacturing, and domestic, but being required to make them equal and uniform as to each class, and being further required to "so adjust them that the net annual receipts and profits thereof to the said persons, associations, and corporations so furnishing such water to such inhabitants shall be not less than six nor more than 18 per cent. upon the said value of the canals, ditches, flumes, chutes, and all other property actually used and useful to the appropriation and furnishing of such water, of each of such persons, companies, associations, and corporations; but in estimating such net receipts and profits, the costs of any extensions, enlargement, or other permanent improvements of such water rights or water works shall not be included as part of the said expenses of management, repair, and operating of such works, but when accomplished may and shall be included in the present cost and cash value of such work."

By section 6 of the act, it is provided that at any time after the rates have been once established by the board of supervisors the same may be established anew or abrogated in whole or in part by such board, to take effect one year next after such first establishment, upon either the written petition of twenty-five of the inhabitants who are tax-payers of the county, or "upon the written petition of any persons, companies, associations, or corporations, the rates and compensations of whose appropriated waters have already been

fixed and regulated and are still subject to such regulation by any of the boards of supervisors of this State, as in this act provided."

Not until after the rates have been once established upon the petition of twenty-five of the inhabitants who are taxpayers of the county is the person, company, or corporation furnishing the water authorized to make any application to the board; then and then only such person, company, or corporation may apply to have the rates established anew or abrogated in whole or in part.

Since to make good the appropriation it is essential that the water be applied to some beneficial use, these provisions of the statute of themselves necessarily presuppose that, until the action of the board of supervisors is called into play, the parties furnishing the water must designate the rates. It cannot be furnished for nothing. The law does not exact that nor has any consumer the right to expect it. The statute evidently proceeds upon the theory that the rates charged by the person, company, or corporation may be satisfactory to the consumers; in which event there would be no occasion for the intervention of the board of supervisors; but, to protect the consumers in the event such charges should be unsatisfactory, they and they only are given the right to first invoke the intervention and action of the board. Until that time the rates established and collected by the person, company, or corporation furnishing the water prevail. This, it seems to me, would be the true and obvious construction of the statute if it had not so declared in terms; but the statute itself does so declare in terms and in these words: "Until such rates shall be so established (namely, those first established by the board) or after they shall have been abrogated by such board of supervisors as in this act provided, the actual rates established and collected by each of the persons, companies, associations, and corporations now furnishing or that shall hereafter furnish appropriate water for such rental or dis-



tribution to the inhabitants of any of the counties of this State shall be deemed and accepted as the legal rates thereof" (Act Cal. of 1885, § 5).

Should the rates fixed by the board designated by the law for the purpose be so unreasonable as to justify the interposition of a court, any party aggrieved would have his remedy in the appropriate court by which such unreasonable rates would be annulled and the question again remitted to the body designated by the law to establish them. But in no case would the court undertake to do so (Reagan *vs.* Farmers' Loan and Trust Company, 154 U. S., 420; Chicago and Grand Trunk Railway Company *vs.* Wellman, 143 U. S., 339; Santa Ana Water Company *vs.* Town of San Buenaventura, 65 Fed. Rep., 323). Therefore, it is not for the court in the present case to go into the question of the reasonableness of the rates established by the complainant and which it seeks to enforce. If unreasonable and the consumers are for that reason dissatisfied therewith resort must first be had to the body designated by the law to fix proper rates, to wit, the board of supervisors of San Diego county.

The suggestion urged by the defendants that the board of supervisors cannot be trusted, but will be controlled by the water company, even if based on fact, is no argument whatever against the existence and validity of the law. But it cannot be true, unless the people themselves, having the selection of such officers, deliberately choose to put in such positions of honor and trust unworthy and debased men.

The views above expressed are conclusive against the positions of the defendants, unless it be, as claimed by them, that the complainant is estopped from making any changes in the rates at which it has heretofore furnished the defendants with water, or that the water in question is so far private property as that the parties to the suit could make valid contracts in respect to the rates at which the company should furnish it to the defendants. If the company is a

private corporation and the water private property, this would undoubtedly be so; but if the complainant is a public or quasi-public corporation, and the water in question is and at all times mentioned has been charged with a public use, it is not true, for nothing can be clearer than that in respect to such water rates established in pursuance of law must control, and that no attempt to ignore that control and to establish them by private contract is of any validity.

The fact that some of the purposes for which the complainant company was incorporated are purely private is unimportant, since among the purposes is "the supplying of water to the public," and "the construction and maintenance of dams and canals for the purpose of water works, irrigation, or manufacturing." As said by the supreme court of California in *Price vs. Riverside L. & I. Co.*, *supra*, the complainant company cannot escape the performance of the duty of furnishing the public with water by asserting that it was also incorporated for some private purpose or purposes. Both the bill and answer assert the public character of the complainant, as well as the fact that the water in question was appropriated by the complainant under and by virtue of the constitution and laws of California for sale, rental, and distribution to the public. In the bill it is alleged "that the said company is, and has been during said time, the owner of valuable water, water rights, reservoirs, and the entire water system, for furnishing water to consumers for domestic, irrigation, and other purposes, for which water is needed for consumption, and of a franchise for the impounding, sale, disposition, and distribution of the waters owned and stored by it to the defendants and other consumers and to the city of National City and its inhabitants." And, again, "that by the expenditure of said large sum said company has procured and owns, subject to the public use and the regulation thereof by law, water, water rights, a reservoir site and

reservoirs \* \* \* and has constructed and laid therefrom its water mains necessary to supply the defendants and their lands hereinafter mentioned and the city of National City, and its inhabitants, with water, and has constructed and put in mains, pipes, and all other things necessary to connect said water supply with the premises and buildings of the defendants and each of them, and to all the buildings and premises of said city and its inhabitants, and to furnish them, and each of them, with water, and was, at the times hereinafter mentioned, furnishing them and each of them with water."

The defendants, in their answer, "deny that said corporation is or at any time was the owner of the water or water rights as alleged in the complaint, otherwise than as the appropriator under the constitution and statutes of the State of California, and the acts of Congress, of the water of the natural stream in the said county of San Diego known as the Sweetwater river. And they aver that the purposes of such appropriation were for sale, rental, and distribution to the public."

In view of these statements in the pleadings of the parties themselves, it is too plain for discussion that the water in question is charged with the public use declared by the constitution and laws of California. Under such circumstances the case of *McFadden vs. Board of Supervisors of Los Angeles County* (74 Cal., 571), relied upon by the defendants, has no application whatever.

Nor is the case one, in my opinion, for the operation of any doctrine of estoppel. Indeed, one of the counsel for the defendants says in his brief: "It is not our claim that the company is estopped to change the rate by reason of the fact that it has established and collected a lower rate, but we claim that, in so far as the company is engaged in furnishing water for a public use, it has no right to make rates at all, either in the first instance or by way of changing them after they have once been adopted; that in so far

as the use is private, when the right arises out of a contract or deed, the rate fixed by the contract controls, and the rights vested by the deed at the time it is made cannot be changed by one party to it. Neither do we claim that by any contract between the parties with reference to the rates to be charged for the use of water where it is being distributed to the public, the power of regulation which the constitution declares should belong to the State can be taken away. What we say is that as to those rates which are vested, as it were, as private rights, the company has no legal right to establish another rate than that agreed upon; that in so far as the rate is to a public use, the statute has said that that which has been fixed and established by the mutual consent of the parties or by their action, which amounts to consent, those rates shall not displace the power of the government to regulate, but shall themselves be the rates until the sovereign power of regulation is exercised."

As the water in question, from the moment the appropriation became effective, became charged with a public use, it was not in the power of either the corporation making the appropriation or of the consumers to make any contract or representation that would at all take away or abridge the power of the State to fix and regulate the rates. All persons are presumed to know the law, and those who bought lands from the complainant corporation upon its representations that water for irrigation would be furnished at the annual rate of \$3.50 an acre, or otherwise acted or contracted with reference to such rates, must be held to have known that the constitution conferred upon the legislature the power and made it its duty to prescribe the manner in which such rates should be established. This the legislature has done by the act of March 12, 1885. As by that act the legislature deemed it proper to allow the action of the board of supervisors to be invoked in the first instance only by twenty-five inhabitants, who are tax-payers of the county, and until then to leave the designation of rates to

the person, company, or corporation furnishing the water, to hold valid and binding any contract between parties with reference thereto would be in effect to ignore and set aside the provisions of the statute upon the subject, for it is plain that a contract must bind all of the parties to it, or it binds none; and, if binding at all, its manifest effect would be to remove from the regulation of the State the rates in question, and leave them to be governed and controlled by private contract, or such representations and acts as may amount to the same thing. No company or corporation charged with a public use can be estopped by any act or representation from performing the duties enjoined on it by law. It will hardly be contended that the defendants, by reason of any of the express contracts pleaded in defense of the suit or of any contract growing out of the representations alleged to have been made by the company, would be estopped from applying to the board of supervisors of the county for the establishment of rates. The case, in truth, affords no basis for the operation of an estoppel against either party, which, to be good, must be mutual (*Litchfield vs. Goodnow*, 123 U. S., 549).

The complainant, being in charge of a public use, in the management of it, does not act for the defendants alone, but, to the extent of the capacity of the system to furnish water, for all of the public who are or may be situated within its reach, all of whom similarly situated and for like purposes are entitled to similar rates.

Exceptions sustained.

## Statement of the Case.

OSBORNE *v.* SAN DIEGO LAND AND TOWN COMPANY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF CALIFORNIA.

No. 201. Argued March 19, 1900. — Decided May 14, 1900.

The appropriation and disposition of water in California is a public use, and the right to collect tolls or compensation for it is a franchise, subject to regulation and control in the manner prescribed by law, and such tolls cannot be fixed by the contract of the parties.

It is not for the court to go into the reasonableness of the established rates, which are sought to be enforced in this case, but if the consumers are dissatisfied with them, resort must first be had to the body designated by law to fix proper rates, the board of supervisors of the county.

THIS was a bill in equity to review and reverse a decree entered in the United States Circuit Court for the Southern District of California in a suit in which Charles D. Lanning, receiver of the San Diego Land and Town Company of Kansas, was complainant, and appellants herein were respondents, and in which the appellee was substituted before decree as complainant in lieu of said Lanning.

The bill is extremely voluminous, reciting all the pleadings and proceedings in the original suit.

The following is a condensed summary of them:

The bill, in addition to the incorporation of the company and the appointment of a receiver of its assets and affairs, alleged that it was the owner of valuable water, and water rights, reservoirs and an entire water system for furnishing water to consumers, and that it had a franchise for impounding, sale and disposition of the waters owned and stored by it to the respondents and other consumers, and to the city of National City and its inhabitants.

The company's supply of water came from the Sweetwater River, a small stream about five miles from the city of National City, and its means of distributing the water, which were de-

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scribed, could supply but a limited amount of territory, consisting of farming lands within and outside of said city, and in part of the residence portion of the city.

The company in procuring the water and its distributing system had expended up to January 1, 1896, the sum of \$1,022,473.54, which was reasonably necessary for the purposes.

By the said expenditure it had procured and owned, "subject to the public use and the regulation thereof by law," water and water rights, a reservoir site, and a reservoir of the capacity of six thousand million gallons, and had constructed mains necessary to supply the defendants and their lands, and had constructed and put in the mains and pipes necessary therefor, and was at the time mentioned in the bill furnishing the defendants and each of them with water.

The defendants are the owners respectively of tracts of land under the system of the company, most of them of only a few acres each, and each became the owner of a water right to a part of the water of the company necessary to irrigate his tract of land, and became liable to pay for a yearly rental such as the company was entitled to charge and collect.

The annual expense of the system and its operation, including interest on its bonds, and excluding the natural and necessary depreciation, was \$33,034.77, and to pay this expense and income of six per cent on the amount invested on the 1st of January, 1896, it was necessary that the rates for water be fixed to realize \$119,791.66.

The amount realized outside of the city of National City for that year was about \$15,000, and no more than that sum could be probably realized for the year ending January 1, 1897.

The mains and pipes were perishable, and required to be replaced at least once in sixteen years, and required frequent repairs.

To acquire the water and construct the system, the company was compelled to borrow \$300,000, and to pay interest in the sum of \$21,000 annually, which must be realized from the sale of its water, and was part of its operating expenses, and the share of its revenues which should be raised in the city of National City was about one third, and the amount which could

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be raised from said city at the rates which prevailed under the ordinance mentioned in the bill was about \$10,715 per annum, and no more.

The value of its water franchises and system was one million one hundred thousand dollars.

No other person or corporation was furnishing water to defendants, nor was there any other system by which they could be furnished, but the franchises and the rights of the company were not exclusive.

The city of National City was a municipal corporation of California, of the sixth class, and the board of trustees thereof, claiming to act under the constitution and laws of the State, passed an ordinance fixing the rates to be charged for water sold and furnished by the company to consumers of the city.

The company commenced to furnish water in the year 1887, and was informed by its engineer that its system and supply of water would furnish to consumers sufficient to irrigate twenty thousand acres, and in addition what would be necessary for domestic use inside and outside of said city. The company was unfamiliar with the operation of the plant and system constructed and the cost of operating and maintaining them, and relying upon the estimates of the engineer, and believing that an annual rate of \$3.50 per acre would be sufficient, fixed the rate at such sum, and had charged it until January 1, 1896, but instead of being able to supply sufficient water to irrigate twenty thousand acres, it had been demonstrated by actual experience that the system would not supply sufficient to irrigate, to exceed seven thousand acres, together with water demanded for domestic use, and it was believed not to exceed six thousand acres, although there were about ten thousand acres under the system susceptible of irrigation.

At the rate of \$3.50 per acre, even if all the lands of the system should be supplied with water and the rates in National City should be maintained, the company would not be able to pay operating expenses and maintain its plant, and the money invested in it would be lost, and the company would be compelled to furnish water at a loss, as it had been furnishing water at a loss, and its system had been going gradually to decay con-



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sequent upon the want of revenue and means to replace the same.

To pay cost of operating and maintaining its system and a reasonable interest it was necessary to charge \$7.00 for irrigation purposes, and said sum was a reasonable rate for consumers to pay, and the smallest amount for which the company could furnish water without loss.

By the laws of California the board of supervisors might upon petition of twenty-five inhabitants and taxpayers of the county fix the yearly rental for water, but no such petition had been presented or rates fixed in the case of the company.

For the reasons above stated the company gave notice to the defendant that on January 1, 1896, it would establish a rental of \$7.00 per acre.

The defendants and each of them refused to pay such sum, and maintain that neither the company nor its receiver had the power to increase the rental, and that the former rate must be and remain the rental until the board of supervisors establish one as provided by law.

The increase of the rental was absolutely necessary to maintain and operate the plant.

To enforce the rental the complainant caused the water to be shut off the premises of each of the defendants, and each of them threatened and would, unless restrained by the court from doing so, commence a suit in the Superior Court of San Diego County, California, to compel complainant to turn on and furnish water again, claiming the use for \$3.50 per acre, and for damages. The rights of the defendants and the determination of the question of the right of the company would affect all in the same way and extent, except the quantity of land owned by the several defendants was different.

The bringing of said suits would involve complainant in a multiplicity of suits, would hinder him in the operation of the property of the company and the settlement of its debts and obligations, and the questions involved could better be settled in one suit.

The increase in rates would add to the revenue of the company with the amount of land now under irrigation, not less

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than \$14,000 per annum, and upon the whole of the land which could be irrigated not less than \$20,000 per annum.

There were allegations of the legal character of certain of the defendants, and the bill concluded with the following prayer:

"Wherefore your orator prays your honors to grant to him the writ of injunction against the defendants and each of them, enjoining them from prosecuting in the state courts or elsewhere separate actions against your orator or said land and town company; that said defendants and each of them be required to appear in this suit and set up any claims they may have against the right of your orator or said company to increase the rental for water furnished by said company, as aforesaid, and that it be finally decreed by this court that your orator, as such receiver, and said company have the right to increase the amount of its rentals to any reasonable sum, and that the sum of \$7.00 per acre per annum is a reasonable rental to be charged, and that the defendants and each of them be required to pay said rate as a condition upon which water shall be furnished to them, and that your orator shall have generally such other and further relief as the nature of his case may require."

The answer was very long and somewhat confused by repetitions. The substance of it is given in the opinion of the Circuit Court. 76 Fed. Rep. 319.

It is sufficient for the purpose to say that its allegations and defences were based on the claim that the supply and system of the company were subject "to the water rights, easements in and servitudes upon said reservoir and system, and to all other rights acquired by these defendants therein . . . and annexed to the respective parcels of lands of these defendants. And also each such water right and easement was in freehold and was a freehold servitude imposed upon said water system for the benefit of the land to which it was appurtenant, and that all claims and demands of said company for the price or compensation therefor had been paid or otherwise satisfied by purchase or otherwise, as in the bill of complaint alleged." And such rights extended to and included the right to have the company maintain that system efficiently to conduct the water to the premises of each of the defendants for irrigation, and other

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uses, at "the annual rates to be deemed and accepted as the legally established rates therefor under the facts hereinafter set forth."

These facts were, besides those stated in the opinion, that each defendant and all of them paid the full amount demanded by the company as the price of the perpetual easement of water supply from the system granted and annexed to their lands, and that they were forever discharged from the payment of any further sum to apply on the principal of or as income upon the cost or value of the system or debt incurred for its construction or the value of their respective water rights. And that in these respects the company had put all lands on an equal footing, and they had remained on the same footing for more than five years, and in many cases had changed hands; that the value of the water rights had for more than five years entered into the market value of the lands and the price paid to their vendors by the defendants, who were their successors in title, and they were induced to purchase, improve and settle upon their respective parcels on account of the rate of \$3.50 per acre per annum, and it entered into and became a material element of their value.

That by the constitution of the State of 1879, it is provided in article XIV, section 1, among other things, as follows, to wit:

"The use of all water now appropriated, or that may hereafter be appropriated, for sale, rental or distribution, is hereby declared to be a public use, and subject to the regulation and control of the State, in the manner to be prescribed by law."

"SEC. 2. The right to collect rates or compensation for the use of water supplied to any county, city and county, or town, or the inhabitants thereof, is a franchise, and cannot be exercised except by authority of and in the manner prescribed by law."

And in pursuance of the provision the legislature passed an act approved March 12, 1885, entitled "An act to regulate and control the sale, rental and distribution of water in this State other than in any city, city and county, or town therein, and to secure the rights of way for the conveyance of such water to the places of use."

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The act provided that the sale and distribution of appropriated water was a public use, and the right to collect compensation therefor a franchise, and, except when furnished by a city or town, should be regulated and controlled by the board of supervisors of the counties of the State in the manner prescribed, and that the board might establish different rates as the case might be, and different rates for the several different uses, such as mining, irrigating, etc., for which the water should be applied, and the rates fixed should be binding and conclusive for a year, until established anew or abrogated. And it was provided that until the boards of supervisors establish rates, the rates "actually established and collected . . . should be deemed and accepted as the legally established rates."

That the rate of \$3.50 per acre was the only actual rate for irrigation which had ever been established and collected by the company or its receiver, or assented to by consumers.

That they each had since January 1, 1896, paid the rate of \$3.50 per acre to the complainant as receiver, and were willing and offered to pay the same as long as it should be legally established. And it was averred that in so far as the act of 1885 purported to prohibit the company from the sale of servitudes in freehold upon its system, or to contract respecting the same, or to receive full compensation from any consumer therefor who was willing to contract for the same, and to prescribe that such easement should be used only upon the terms and conditions that the owners render net annual receipts and profits upon the value thereof in perpetuity, or to prohibit contracts respecting the annual receipts, or to extinguish and satisfy the right of the company to such net annual receipts, the same was unconstitutional and void, and in conflict with the Fourteenth Amendment of the Constitution of the United States, and section 1, article 9, of the constitution of the State.

That the liability of the defendants to pay rates was several, not joint, and that certain of the defendants were not residents of the State, certain others not residents of the county of San Diego and others were school districts, and that none of them were competent to make petition to the board of supervisors, as required in the act of 1885, and said act, as far as it pur

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ported to authorize the company to increase the rates of \$3.50 per acre, was in violation of the Fourteenth Amendment of the Constitution of the United States, and deprived each of them of his or her property without due process of law, and to each of them the equal protection of the laws.

That in so far as the statute of 1885 purported to authorize the company to shut off water from the lands of defendants or to increase the rate without consent of the defendants, or to permit its collection without giving the defendants a standing in court to contest the reasonableness of the increase, was also in violation of said Fourteenth Amendment. And, also, that the complainant, by shutting off water, violated that amendment.

The bill of review then averred that there were exceptions taken to the answer on the ground that it did not set forth or discover relative and material matters of fact tending to show that the bill was not true or in confession or avoidance thereof, but instead set forth immaterial and irrelevant matter.

Each exception was specific, but altogether they went to the whole answer except its admissions and certain of its denials.

It was prayed that the defendants be compelled to amend the answer, and to put in a full and sufficient one.

The exceptions coming on to be heard, they were sustained — the defendants excepted.

By order of the court, on motion of complainant, Charles D. Lanning was discharged as receiver, and the San Diego Land and Town Company of Maine was substituted as complainant — defendants excepted.

A notice was given of a motion to be made that the bill in the suit be taken *pro confesso*, and a decree of the court be taken accordingly, on the ground that the exceptions to the answer had been sustained and no amended answer had been filed within the time allowed.

The motion came on to be heard, and pending its hearing, the defendants gave notice of a motion to dismiss the suit on the ground that the receiver had been discharged, the property had been sold under foreclosure, and had passed into the hands of another corporation; that the San Diego Land and Town Com-

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pany of Maine was not the successor of the receiver, and had no interest or right to prosecute the action, and that the board of supervisors of San Diego County had fixed the rates of the company.

The two motions came on to be heard on the 2d of January, 1898, and the motion to dismiss was denied, and the motion that the bill be taken *pro confesso* against all the defendants was granted, and a decree ordered to be entered according to the opinion of the court. The defendants excepted.

The bill of review further averred that the court caused to be entered, greatly to the prejudice of the orators, its decree, which was set out at length. It further averred that the defendants had paid the costs adjudged against them, and detailed at length their exceptions to the ruling of the court. The exceptions reasserted the materiality and sufficiency of the averments of the answer, contended that the court misapprehended them, and erroneously treated and considered the exceptions as raising for discussion the merits of the case, and by expunging the answer from the records, deprived the defendants of the right to have the merits of their defences on their face regularly determined upon the setting of the cause for hearing on bill and answer or upon issues raised and proofs made.

The bill of review asserted further errors against the decree in that it denied the rights alleged in the answer of defendants, and so construed and enforced the constitution and statutes of the State as to violate section 1, article 14, of the Constitution of the United States, in that it maintained the company and the receiver in increasing the rate, and the condition of non-payment the right to shut off the water from the lands of the defendants, and thereby deprived them of the equal protection of the laws and of their property without due process of law. And further, because it was an exercise of judicial power to the same end, and to the deprivation of the right of contract without due process of law. Also denied to the State a republican form of government, guaranteed by section 4, article 4, of the Constitution of the United States, in that, as enforced and applied, the State assumed the absolute control of all water

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appropriated and all works for its distribution, abolished capacity to acquire property, rights and servitudes in such water and waterworks absolutely, or with ownership of lands for irrigation, or free from the perpetual obligation to pay net revenue of not less than six nor more than eighteen per cent per annum upon the cost or value of the water system; and abolished the right or capacity to ascertain, fix or define, by contract or convention, the rate of compensation to be paid by any consumer for the supply of water for irrigation of land.

Error was also asserted in the decree in that it was in favor of the San Diego Land and Town Company, of Maine, although it had not become a party to the cause, by supplemental bill or otherwise, and because what interest it had did not appear, nor was its claim to any interest set forth, so that the defendant could answer or plead thereto. Also, error in that the court had no jurisdiction to entertain the cause or make any decree on the merits, and error in not dismissing the suit after the discharge of Lanning, the receiver and complainant.

The bill concluded with the following prayer:

"Wherefore, as said errors appear on the face of the record, and are greatly prejudicial to complainants and their rights in the premises, complainants pray that said decree may be reviewed, reversed and set aside, and no further proceedings taken therein: and to that end complainants pray process by subpoena against the San Diego Land and Town Company, of Maine, requiring it to appear and answer hereunto, and show cause, if it may, why said decree should not be reviewed, reversed and set aside, and such further orders and decrees be made as to the court may seem just, including the restoration to your orators of the sum of money paid under said decree, as aforesaid."

The defendant (appellee) moved the court to strike the bill from the files and dismiss the suit.

The motion was denied. The water company then demurred to the bill on the grounds that it appeared therefrom that there was no error in the proceeding and decision in *Lanning v. Osborne*, appearing on the face of the record or otherwise; that complainants were not entitled to the relief prayed for, or any relief; that no error appeared in said suit which could be re-



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lieved by a bill of review or a bill in the nature of a bill of review; that the remedy of complainants was by appeal.

The demurrer was sustained with leave to complainants to amend the bill in ten days.

The complainants elected to stand on their bill, and decree was entered on the demurrer as follows:

"It is therefore considered and decreed by the court that the plaintiffs take nothing by their bill herein; that said bill be, and the same is hereby, dismissed, and that the defendant have and recover of and from the plaintiffs its costs in this behalf laid out and expended, taxed at \$20.50."

The case was then brought here.

*Mr. Alfred Haines* for appellants.

*Mr. John D. Works* for appellee. *Mr. Lewis R. Works*, *Mr. Bradner W. Lee* and *Mr. Charles D. Lanning* were on his brief.

*Mr. John Garber* and *Mr. Frank H. Short* filed a brief as *Amici Curiae*.

MR. JUSTICE McKENNA, after making the above statement, delivered the opinion of the court.

One of the grounds of demurrer to the bill was that it appeared from the complainants' own showing that their remedy was by appeal and not by bill of review. It is not pressed with much earnestness here, and is clearly untenable. *Whiting v. United States Bank*, 13 Pet. 6; *Putnam v. Day*, 22 Wall. 60; *Buffington v. Harvey*, 95 U. S. 99; *Ensminger v. Powers*, 108 U. S. 292; *Willamette Iron Bridge Co. v. Hatch*, 125 U. S. 1; Story's Equity Pl. 10th ed. sec. 403 *et seq.*

The principal contention of the appellants is that the water rights are easements in the real estate constituting the water system. In other words, (as described by appellants) "incorporeal interests in the corporeal property of a water system annexed to lands irrigated by that system." Being such, the corporation may sell them, the land owner may contract for them



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— may buy them outright and free himself wholly from annual rates, or may stipulate for a particular rate. In other words, that the water right is an interest in the system, paid for with the land, or by the stipulated rate, and not subject to any rate or to increase beyond the stipulated rate, according to the varying expenses or valuations of the system.

It is claimed to be property, and the right to sell and to buy it is asserted respectively for the owner of the system and the consumers of its waters, and that the constitution and laws of the State of California do not prohibit this, or if they can be construed to do so, violate the Fourteenth Amendment of the Constitution of the United States by depriving appellants of their property without due process of law, and violate also certain provisions of the constitution of the State of California.

It is further contended by appellants that conceding a contract cannot be made between "water corporations" and their customers for a particular rate which will preclude regulation by the State, that until such regulation the parties—company and consumers—may contract. And, further, that the rate of \$3.50 per acre per annum was the rate charged and collected by the company, and therefore became the rate established by law by virtue of a provision in section 5 of the statute of 1885, hereafter quoted.

It is also contended that the answer in the original suit averred the rate of \$3.50 per acre per annum was a reasonable rate, and denied that the increased rate of \$7.00 per acre was reasonable, and that on the issue thus raised, the defendants there, complainants in the bill of review, were entitled to a hearing.

The charge of error in the decrees is based on their adjudging against these contentions.

Opposing the contentions of appellants, the appellee makes a distinction between the facilities for the use and the right to use the water of its system and the actual use of it. The compensation for the former, appellee concedes may be the subject of contract; the rate for the latter, it contends, is subject to reg-

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ulation by law, but, until so regulated, may be established by the water companies.

The Circuit Court did not accept the distinction made by appellee. It did not accept the view contended for by appellants. It held, interpreting the constitution and laws of the State, that the appropriation and disposition of water was a public use, the right to collect tolls or compensation for it a franchise, subject to regulation and control in the manner prescribed by law, and that such tolls and compensation could not be fixed by the contract of the parties.

If the contention of the appellee is justified, that the contracts between it and the appellants gave it the right to establish the rates, the controversy is narrowed and simplified, and we are relieved from deciding the many interesting and difficult questions pressed by appellants for judgment.

There was some difference in the way the water rights of the defendants arose, but they are assimilated in the same legal right by the allegation in the original answer, that the company did "not make or claim any distinction in respect of the character and quality of the water right, or of the annual rates actually established or collected for irrigation."

It is only necessary, therefore, to say in description that some of the lands were purchased before 1892, and up to that date there was no express or separate grant of "water rights." Some were purchased after 1892, and as to them there was a specific sale of the appurtenant water right. The contracts in both cases contained an agreement to sell certain described real estate, "together with a water right to one acre foot of water per annum for each and every of said above described real estate, to be delivered by the party of the first part through its pipes and flumes at a point — said water to be used exclusively on said real estate, and not to be diverted therefrom. Provided, that the party of the first part may change the place of delivery of said water, so long as the same is near the highest point of said land. For which land and water right the party of the second part agrees to pay the sum of — dollars."

The contracts also contained the following provisions:

"And the party of the second part further agrees and binds

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—self, — heirs, executors and assigns to pay the regular annual water rates allowed by law and charged by the party of the first part for water covered by said water rights, whether such water is used or not, and to pay for all water used on said land for domestic purposes, monthly, under such rules and regulations for the delivery of water to consumers, as the party of the first part may from time to time make.”

Other lands (about nine hundred acres) described in the answer as “lying outside of National City” were derived, not from the company, but water rights were attached to them on the same basis as to the lands sold by the company up to 1892. After that date the company refused to furnish water, except upon the payment of a sum in gross for the water right over and above the uniform annual rate established and collected, or in lieu thereof six per cent annual interest upon the company’s estimate of the value of such right. The price was first fixed at fifty dollars, afterwards at one hundred dollars, and the contract in addition providing for the sale of the water right contained the following provision :

“In consideration of the foregoing stipulations and agreements, the party of the second part agrees and binds — self, — heirs, executors and assigns, to pay the sums above specified promptly as the sums, and each of them, falls due, and that — will in all things comply with and perform the terms and conditions of this agreement on — part to be performed, and that, — and they will promptly pay all annual water rates and charges for the water to which — is entitled under and by virtue of this agreement, at rates fixed by the party of the first part as allowed by law, and at the times, in the manner, and according to the rules and regulations made and adopted by the party of the first part, the annual rental for the amount of water to which the party of the second part is entitled under this contract, to be paid whether the same is used or not, and also to pay for all water used by — on said land for domestic purposes at the rates fixed by the party of the first part and allowed by law.”

Under the same form of contract water rights were attached to about four hundred acres of lands belonging to other defendants.

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To lands which lay in what is designated Ex-Mission the contracts contained the following provision :

"The parties of the first part will make application for the use of the water upon the form provided by the party of the second part for that purpose, and pay for the use of the water at the current rates as may be enforced from time to time for supplying lands in National Ranch, and subject to the same general rules and regulations."

J. M. Ballow, one of the defendants, claimed his water right under a contract, which provided as follows :

"Provided, that said party of the second part shall make application in the form provided by the company, for the use of the water, and use the same under the same restrictions and conditions, and to pay said party of the first part the current rate therefor, as established, for Chula Vista ; provided, said restrictions and conditions are not inconsistent with the water right hereby granted to said party of the second part."

The rates in Chula Vista were governed by the general contract.

It is apparent that the contracts in all things substantial to the controversy are similar. They provide for the payment of a certain sum for land and water rights, or for water rights alone, and all for the payment of annual rates besides. And provide directly or by reference that the annual rates shall "be fixed by the party of the first part, (the company,) as allowed by law," to be paid whether the water is used or not. Water used for domestic purposes is also to be paid for "at the rates fixed by the party of the first part and allowed by law."

These provisions do not leave much room for construction. For irrigation purposes and for domestic purposes the rental of water is to be paid at rates "fixed" by the company. The only qualification is "as allowed by law." What this means we shall presently consider ; but whatever it means, it does not sustain appellant's contention that the rate of \$3.50 per acre per annum was irrevocable, secured to them free from the power of variation by the company or by law. It is not important to consider, therefore, whether, under the constitution and laws of the State, they could contract with the company for the price

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of a water right. If the contract, they plead, gives to the company the power to fix the annual rate, the only inquiry which need be, is whether the power has been exercised "as allowed by law." What this means can be the only controversy.

The appellee concedes the power of the regulation of rates by the board of supervisors, but claims that until the power is exercised the right to fix the rates rests with it, and that those fixed by it are "allowed by law." The appellants contend that the power of the board of supervisors is only a power to fix maximum rates, and below them the right of the parties to contract is unrestrained, (a view sufficiently discussed already,) and that until the board shall act "the statute itself fixes the standard of maximum rates, as being the 'actual rates established and collected by the corporation,' and forbids the corporation to exceed such maximum."

The contention is claimed to be based on section 5 and section 8 of the act of 1885. Section 5 vests the power to fix rates in the board of supervisors, and provides "when so fixed by such board shall be binding and conclusive for not less than one year next after their establishment, and until established anew or abrogated by such board of supervisors as hereinafter provided." And then follows the provision upon which appellants especially rely :

"And until such rates shall be so established, or after they shall have been abrogated by such board of supervisors, as in this act provided, the actual rates established and collected by each of the persons, companies, associations and corporations now furnishing, or that shall hereinafter furnish, appropriated waters for sale, rental or distribution to the inhabitants of any of the counties of this State, shall be deemed and accepted as the legally established rates thereof."

Section 8 provides that those furnishing water "shall so sell, rent or distribute such waters at rates not exceeding the established rates fixed and regulated therefor by the boards of supervisors of such counties, or as fixed and established by such person, company or association, or corporation, as provided in this act."

The deduction which appellants make is that when the com-

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pany once fixes the rates they must remain so fixed, and if changed by supervisorial action recur upon the cessation of that action—inevitable always through every change of condition; if excessive, to forever remain so; if deficient, to forever remain so.

The argument urged to support this is that one of the ordinary meanings of the word "actual" is "existing at the time." "And if" (to quote counsel) "the lexicographer be consulted to define the word establish he will give its meaning substantially, as does the Century Dictionary, to be 'to make stable; firm or sure; appoint; ordain; settle or fix unalterably.'" To illustrate the immutability which one of its senses convey, counsel quote with apologetic reverence an illustration, which they say is often found in standard dictionaries: "I will establish my covenant with him for an everlasting covenant." Gen. xvii: 19.

We are not impressed with the aptness of the illustration to the case at bar.

Covenants formed and promulgated by a divine wisdom and foresight can have the attribute of immutability, and their language may be used and interpreted to express it. Human regulations are for the most part occasional and temporary. Besides, one definition of a word does not express its whole meaning or necessarily determine the intention of its use. If so, interpretation would not be difficult, and the application of the language of a law or contract would be as unerring as easy.

"Actual," of course, means existent, but it does not preclude change. Nor does the word "establish" convey the idea of permanency. As used in the statute, it has no such meaning. The power of the board of supervisors is not exhausted by one exercise, nor has its result unalterable fixity. It is beyond change only for a year. The language of the statute is that any time after the establishment of such water rates by any board of supervisors of this State the same may be established anew or abrogated in whole or in part by such board, to take effect at not less than one year next after such first establishment. . . ."

It is manifest to construe the word "establish" to mean "to

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fix unalterably," would throw the powers of the board of supervisors into confusion and contradiction.

To say that the rates are unalterable for a year would prove nothing. Such effect comes, not from the use of the word "establish," but from other words, and, but for them, rates established might "be established anew," as often as the board of supervisors might choose. Nor can it be said that the word means one thing when applied to the power of the board of supervisors, and another thing when applied to the power of the company. To say so is to abandon the argument. That depends upon the meaning of the word "establish" to be "to fix unalterably"—to mean of itself, and in its use, permanence and unchangeability. If it does not mean that of itself, there is an end of the argument, for there is nothing in the act or its purpose which would give it such meaning when expressing the power of the company, and something else when expressing the power of the board of supervisors. The purpose of the act rejects such view. Its purpose is regulation, deliberate and judicial and periodical regulation by a selected tribunal, and we cannot believe that the legislature intends by an absolute and peremptory provision to fix rates upon the water companies unalterable by them, no matter what change in conditions might supervene. Against rates which may become unreasonably high, the statute gives relief to consumers through petition to the board of supervisors. Rates which may become unreasonably low, it surely does not intend to impose on the companies forever, except as relief may come from the voluntary justice of its customers or by a violation of the statute and appeal to the courts. There is nothing in the act to indicate such purpose, nor does it need to have such purpose. Its dominant idea is the regulation of rates by law, not commanded to be exercised by the governing bodies as a voluntary duty as establishing rates in cities and towns, but exercised when invoked by petition. Until the necessity of that, what more natural and just than to leave the right with the water companies and recognize it as legal. This is the meaning, we think, of the provisions of sections 5 and 8, *supra*. To so interpret them makes the scheme of regulation complete—adequate, without being meddlesome or



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oppressive. The power of regulation is asserted and provided for, and ready to be exercised to correct abuse, and who doubts but that its exercise would be invoked.

The appellants assign many errors upon the action of the Circuit Court in sustaining the exceptions to the answer made in the original suit. It would extend the opinion to too great length to consider them separately. They are reduced to and depend upon the claim that they constituted a submission of the case on bill and answer, and if the latter traversed any material allegation of the bill it could not be taken *pro confesso*, and a decree entered upon it would be erroneous. *In re Sanford Fork & Tool Co., Petitioner*, 160 U. S. 247.

The application of the principle is claimed upon the ground that the answer denies that the rate of \$3.50 per acre per annum is unreasonable or that the increased rate of \$7.00 per acre is reasonable.

The Circuit Court held that issue was not open to its decision. It said that if the rates established by the board of supervisors were unreasonable they could only be annulled. In no case would the court fix them. "Therefore," it was further said, "it is not for the court in the present case to go into the question of reasonableness of the rates established by the complainant, and which it seeks to enforce. If unreasonable, and the consumers are for that reason dissatisfied therewith, resort must first be had to the body designated by the law to fix proper rates, to wit, the board of supervisors of San Diego County."

We concur in this view, and finding no error in the decree it is

*Affirmed.*